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HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

October Term, 1953
NO. 450

ARTHUR P. ALLEN, Chairman, Twelfth Region Wage Stabilization Board, *et al.*,

Appellants,

vs.

GRAND CENTRAL AIRCRAFT CO., a California Corporation,

Appellee.

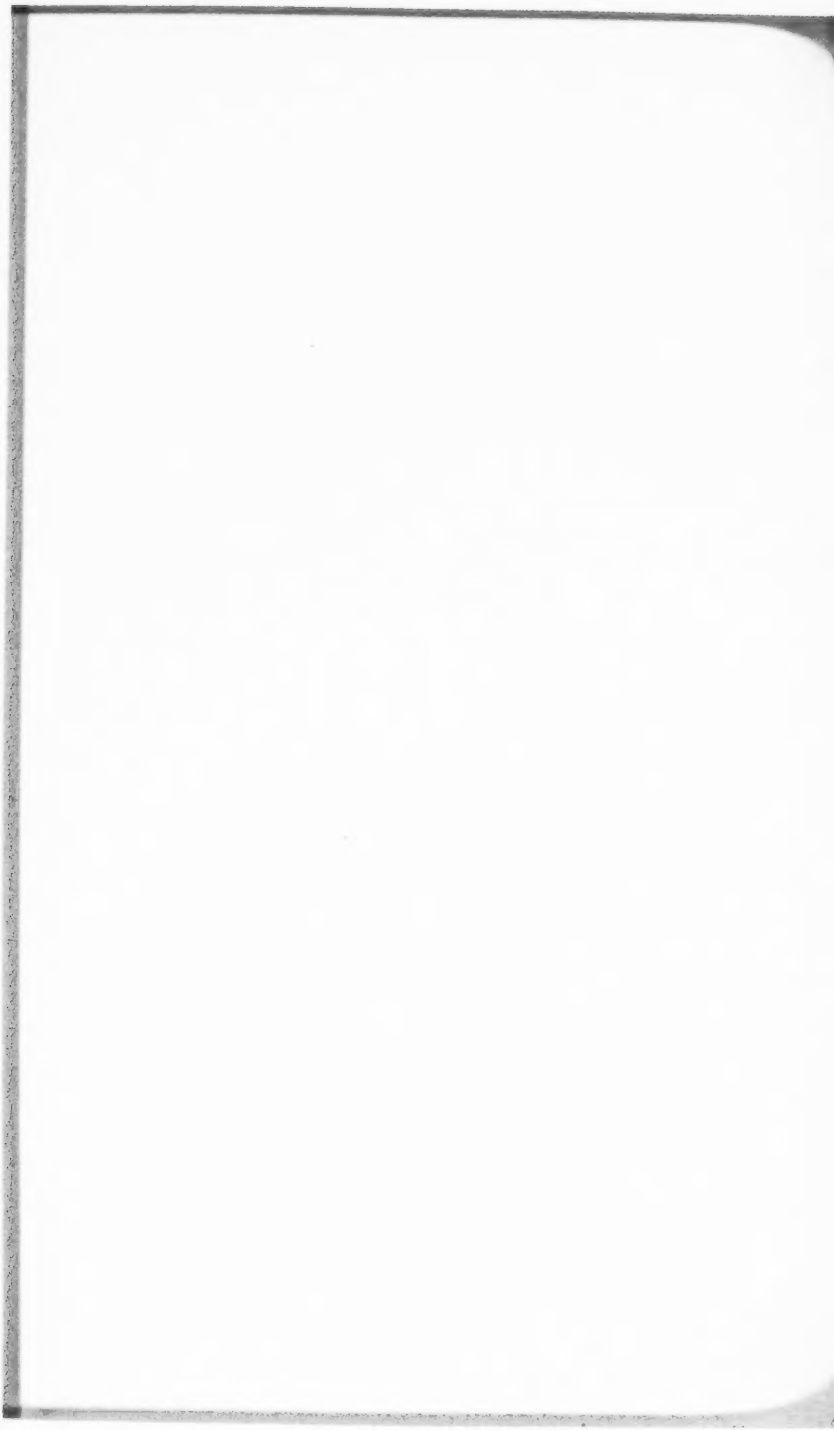
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLEE.

RICHARD W. LUND,
DANA LATHAM,
PAUL R. WATKINS,
830 Statler Center,
Los Angeles 17, California,
Attorneys for Appellee.

RICHARD F. ALDEN,
GROVER R. HEYLER,
LATHAM & WATKINS,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.



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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLEE.

OPINION BELOW.

The July 31, 1953 opinion of the trial court—the statutory three-judge United States District Court for the Northern District of California, Southern Division [R. 33-36]—is reported at 114 F. Supp. 389.

JURISDICTION.

The jurisdiction of this Court is invoked under 62 Stat. 926, 28 U.S.C. § 1253. This Court, on January 4, 1954, noted probable jurisdiction [R. 41]. ..... U.S. ....., 74 S.Ct. 309.

QUESTIONS PRESENTED.

1. Whether jurisdiction to find violations of wage stabilization regulations was lodged in the federal district courts under Section 706(b) of the Defense Production Act of 1950 or was authorized by Section 405(b) to be delegated to an administrative agency.

2. Whether, even assuming that while it was in effect the Act authorized administrative determinations of violations, when all authority conferred by the Act (including authority of the agency created to make such determinations) expressly terminated, the Executive had authority to transfer the functions of such liquidated agency to some other agency and thereby continue administrative hearings to determine alleged violations.

3. Whether the regulations and orders creating the administrative agency and under which it purported to act contravened the statute in that (a) they contained no statement of considerations required by Section 709 of the Act; (b) they were sought to be implemented notwithstanding the non-existence of the Wage Stabilization Board created by Section 403(b); (c) they authorized a disallowance penalty for violations, contrary to Section 405(b), greater than the amount of the wage which exceeded the legal maximum; and (d) they authorized the imposition of penalties for periods prior to the issuance of the order prescribing the penalty.

4. Whether the Act violates various provisions of the Constitution in imposing wage stabilization controls and in authorizing the President by Section 405(b), without any controlling standards, to prescribe the penalty for violation and permitting (as Appellants contend) a penalty of disallowance for income tax purposes, equal to the

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amount of the total violative wages paid, to be administratively determined and imposed without any opportunity for judicial review of such determination.

5. Whether, in view of the irreparable injury Appellee would otherwise suffer, the District Court properly enjoined the Appellants from holding an administrative hearing to try Appellee upon allegations it had violated Section 405(b) of the Act.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes and regulations, except to the extent they are quoted in the Appendix to the Brief for Appellants (pp. 78-103), are set forth in the Appendix attached hereto (*infra,* pp. 107-119).

STATEMENT.

To avoid unduly extending this brief, we will not repeat herein the statement of facts related in the Appellants' Brief (pp. 2-14). However, certain additional legislative and regulatory provisions and pertinent facts will be briefly related.

Statutory provisions. The Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App. §§ 2061 *et seq.* (Supp. V 1952)) contained additional material provisions which the Court should have before it at the outset of its consideration of this case. Section 706(b) provided in part:

> "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability

or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order or subpena thereunder."

Except as covered by the above provision or Section 405(b) itself (Aplts. Br. p. 3), the Act contained no authorization for the imposition of the penalty, permitted to be prescribed under Section 405(b), for violations of wage stabilization regulations.

Section 709 provided that, "Any rule, regulation, or order" issued under the Act "shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations."

By Section 403(b), adopted in 1952, a Wage Stabilization Board was created, to be "composed in equal numbers, of members representative of the general public, members representative of labor, and members representative of business and industry." The members of the Board were to be appointed by the President "by and with the advice and consent of the Senate." The Board was directed to formulate and recommend to the Economic Stabilization Director general policies and regulations relating to the stabilization of wages and salaries and "advise as to the interpretation . . . of policies and regulations promulgated by such Administrator."

The Defense Production Act of 1950 also had its own "savings clause." In this regard, Section 706(b) provided:

". . . The termination of the authority granted in any title or section of this Act, or of any rule,

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regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order."

Regulations. General Order No. 15 (17 Fed. Reg. 2994, 9977), paraphrased by Appellants (pp. 5-7), provided that the total illegal wage shall be disallowed for tax and other purposes, except that where there were "extenuating and mitigating circumstances," the "usual and general policy shall be to disallow" the illegal excess, that is, the amount of the wage that exceeded the legal maximum. In the instant case, the Appellants have not admitted or conceded that in Appellee's situation there were any extenuating or mitigating circumstances. Though not issued until many months after the wage "freeze" of January 26, 1951, General Order 15 provided that the penalty prescribed would be applicable to wages paid "at any time" (that is, as early as January 26, 1951) in violation of the regulations.

With reference to the provisions of General Procedural Regulation No. 1, Revised (17 Fed. Reg. 7737, 18 Fed. Reg. 1663), summarized by Appellants at pages 8-10, it should be noted that the so-called recommendations of the Enforcement Commissioner constituted a binding determination which was final unless appealed. In the absence of such an appeal, or "clear and prejudicial error," the National Enforcement Commission was required to adopt his Findings and Determination and issue a certificate of disallowance, based thereon, to the appropriate

executive departments. In this connection the regulation provided (Section 4.1):

> "(e) The Enforcement Commissioner shall file the original and two copies of his findings and determination with the National Enforcement Commission and cause a copy thereof to be served upon each of the parties. Upon the filing of the findings and determination, the case will be transferred to the National Enforcement Commission. . . .
>
> "(f) If no appeal is filed as hereinafter provided, the findings and determination of the Enforcement Commissioner shall, in the absence of clear and prejudicial error, be adopted by the National Enforcement Commission and a certificate of disallowance based thereon issue to the appropriate departments or agencies of the government."

Other pertinent provisions of this regulation are as follows:

> Section 5.2(c): "The findings and determination of the National Enforcement Commission shall be final."
>
> Section 6.1: ". . . The certificate of disallowance shall be conclusive for the purposes stated therein."
>
> Section 10.1: "The Enforcement Commissioner, in making his findings and determination, and the National Enforcement Commission in making its decisions, shall, to the extent applicable, be governed by the established regulations, interpretations, and policies formulated by the Board or Office involved in the enforcement proceeding."

Neither General Order 15, General Order 18, 17 Fed. Reg. 2994, 9977 (which established the National Enforce-

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ment Commission of the Economic Stabilization Agency), nor General Procedural Regulation No. 1, Revised contained a "statement of considerations" such as that prescribed by Section 709 of the Act.

While the President appointed members to the Wage Stabilization Board created by the Defense Production Act of 1950, he did not submit the names of such appointees to the Senate for approval. When the President, late in 1952, "reversed" the Economic Stabilization Administrator and the Wage Stabilization Board by approving a wage increase for the coal miners which the Administrator and the Board had held was unapprovable under the existing wage stabilization policies, the chairman (a public member) and the industry members resigned from the Board on December 6, 1952. The President did not appoint any other industry members to fill these vacancies. Instead, by General Order 19 of December 15, 1952, 17 Fed. Reg. 11368, he purported to create an all public member Wage Stabilization Committee to carry on the functions of the Wage Stabilization Board.

Controversy here involved. Long after the Wage Stabilization Board inspected the books and records of Appellee in August of 1951 relative to possible wage stabilization violations [R. 76], on November 4, 1952, the Board issued and filed with the National Enforcement Commission a complaint against Appellee [R. 3, 10, 37]. Therein the Board, with reference to all Appellee's employees subject to the jurisdiction of the Wage Stabilization Board, alleged merely that between January 26, 1951 and January 1, 1952 Appellee "granted wage increases

. . . ., all of which increases were contrary to Wage Stabilization Regulation 1" [R. 3, 10, 37].

On January 28, 1953, in the administrative proceeding, Appellant Norback, Regional Counsel of the Wage Stabilization Board, submitted to Appellee and the Enforcement Commissioner his computation of the amount of wages allegedly paid by Appellee in violation of wage stabilization regulations [R. 46-48, 61, 77-78]. This computation disclosed a total of asserted illegal wages paid amounting to $5,561,484.11, and an illegal excess, that is the amount of wages paid over and above the claimed permissible, of $755,305.50 [R. 46-48, 61, 77-78].[1]

In January, 1953, Appellee moved Enforcement Commissioner Neal to dismiss the complaint upon grounds substantially identical with those relied upon herein [R. 4, 37]. This motion was denied by Appellant Neal on or about February 11, 1953, upon the ground that he was without power to rule on the constitutionality of the Defense Production Act or on the validity of the regulations promulgated thereunder [R. 4, 37]. The injunction com-

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[1]The document submitted by Appellant Norback [Pltf's. Exh. "B"; R. 77-78, 46-48, 61] contained certain mathematical errors. Under the heading 2,B, the increase for a 40-hour week was $5.96 (40 X $1.49), not $7.96 as shown, and for the 40 weeks was $238.40. This figure, multiplied by the number of employees receiving such increases (1741—the total of the listed "Increased in March 1951" —and not the erroneous figure used of 1946) yields a total excess on the March increases of $415,054.40 (in correction of the $619,606.40 shown). Using this figure on the Recapitulation [R. 78], the grand total of the alleged illegal excess is $755,305.50.

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plaint here involved was filed two days later, on February 13, 1953 [R. 10, 34].

In the trial of this case on July 24, 1953, the evidence established as part of the irreparable injury, that should the Enforcement Commissioner in the administrative proceeding against Appellee determine a tax disallowance equal to the asserted illegal excess (which, under the standards in General Order 15 would be the usual disallowance even though he found extenuating and mitigating circumstances), the banks would withdraw the credit extended to Appellee [R. 63-64, 46-48, 61, 77-78] thereby immediately forcing Appellee to go out of business [R. 55-56]. And this would be true notwithstanding asserted rights of appeal of that decision to the National Enforcement Commission. The nature of Appellee's operations was such that it needed to receive weekly bank loans in order to meet its weekly payrolls [R. 53-54]. Based upon these and other facts, the trial court found that Appellee would suffer immediate irreparable injury if the administrative proceedings were allowed to continue and in view of the illegality of that proceeding, the permanent injunction was granted [R. 31-37].[2]

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[2]With reference to the Motion to Vacate Temporary Restraining Order filed by the Appellants with the District Court on April 3, 1953 [R. 16], referred to by Appellants at page 13, footnote 11, the Appellants repeated the same arguments in the Application for Stay of Interlocutory Injunction filed by them in this Court on June 5, 1953. See Objections of Respondent to Application for a Stay of Interlocutory Injunction and Request for Oral Argument in *Norback v. Grand Central Aircraft Co.*, October Term, 1952. The Appellants' application was denied on June 15, 1953. 345 U.S. 988, 73 S.Ct. 1128.

SUMMARY OF ARGUMENT

I.

In February of 1953, the Appellants were about to commence and hold an administrative hearing involving Appellee upon allegations that it had granted wage increases in violation of General Wage Stabilization Regulation No. 1, the so-called wage "freeze" order of January 25, 1951. The wage increases challenged, denominated upon Appellee's records as "merit" increases [R. 4], were given principally in February and March of 1951, during a period when the Wage Stabilization Board was temporarily inoperative because of the resignation of the labor members therefrom.

Acting under various regulations and directives, Appellant Norback and others were about to "try" Appellee on these allegations before Appellant Neal, an Enforcement Commissioner of the National Enforcement Commission, seeking a determination that Appellee had violated the regulations, and a disallowance of the amount of the claimed illegal wages as a cost of operation under the federal income tax and other laws.

Appellee sought to enjoin the hearing and proceeding before the Enforcement Commissioner because of the unconstitutionality of the Act and the invalidity of the governing regulations under the statute and because the Act did not even authorize any determination by an administrative agency as to whether an employer had violated the Act.

At the threshhold, then, is the basic question whether the Appellants had any authority to proceed against Appellee in an administrative forum to determine if it had violated the stabilization regulations.

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Section 706(b) of the Act lodged in the federal district courts jurisdiction of "violations" of the Act and regulations and all actions to "enforce any liability" under the Act and regulations. It also provided that such actions were to be under the supervision and control of the Attorney General. As the trial court held, it was only under this express provision that jurisdiction was created in any tribunal to determine whether an employer had violated the Act and enforce the liability for such a violation.

The Appellants now assert that authorization to administratively determine the question of violation was granted by Section 405(b) of the Act, which, after prohibiting payments in contravention of the regulations, concluded:

> ". . . The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation."

This is, to say the least, strange language to be used if Congress intended thereby to authorize an administrative adjudication of violations, without the usual right to a jury trial and other safeguards in the judicial process. Particularly is this true in view of the heavy potential penalties permitted under the regulations (several millions of dollars in the instant case as contrasted with the maximum fine of $10,000 permitted under Section 409(b) in case of willful violations) and the absence (Section

709) of even the minimum protection afforded by the Administrative Procedure Act. Clearly Section 405(b) does not permit even an inference that Congress intended to authorize the imposition of such penalties by extra-judicial processes.

The language "prescribe the extent to which" only authorized the President to issue a general regulation as to the extent wages found by the appropriate tribunal to have been illegally paid were to be disregarded by the executive departments. The normal, accepted meaning of "prescribe" is, "to lay down authoritatively as a guide, direction, or rule of action." The section only confers regulatory, as distinguished from adjudicatory power. And this regulatory power was in fact exercised when the standards for disallowance were prescribed in General Order 15.

Recognizing the absence of any language in the Act which, even by reasonable inference, authorizes executive adjudication of violations, the Appellants rely most heavily upon the practice under the Stabilization Act of 1942. It is true that that Act did contain a section comparable to Section 405(b) of the Defense Production Act of 1950, and that the practice (though of doubtful validity) was followed under the earlier Act of determining violations administratively. However, the short and conclusive answer to this alleged analogy is that the Stabilization Act of 1942 did not contain any provisions comparable to Section 706(b) of the Defense Production Act of 1950 which placed jurisdiction over the determination of violations in the federal courts.

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II.

Even if it were possible to interpret Section 405(b) as authorizing an administrative adjudication of violations while it was in effect, the Executive would no longer have power to try Appellee or any other alleged violator in view of the expiration of the law. Under Section 717(a) of the Act, Title IV (which included Section 405(b)) "and all authority conferred thereunder" expressly terminated April 30, 1953. Any agency created under the Act was permitted to be continued thereafter "for purposes of liquidation," but only up to October 31, 1953 (Section 717(b)(3)). Thus, since that latter date there has not only been no Act in existence authorizing the imposition of any penalty, but no administrative agency could lawfully exist after that date.

The Appellants assert that administrative proceedings against Appellee can be continued under the Office of Defense Mobilization, to which the powers and authority under Title IV were purportedly transferred. But this attempted transfer is not authorized by any law and is therefore illegal and void. Section 703(a) of the Act, which is still in effect, does authorize delegation of powers. However, it only permits the President to delegate any "power or authority conferred upon him by the Act," and as of May 1, 1953 Title IV did not confer any power upon him relative to wage stabilization.

Nor does the General Savings Statute here apply. It, of course, cannot create and maintain an administrative agency, nor does it authorize transfer of functions from one agency to another. In any event, it is inapplicable because the later Defense Production Act contained its own savings clause, which, however, maintained liability

only in any "suit, action, or prosecution" and did not save any liability in an administrative proceeding.

Congress clearly intended that stabilization controls, for which it had no great sympathy from the beginning, and the administration thereof should be wound up entirely and concluded as soon as possible after April 30, 1953 and in any event not later than October 31, 1953. It did not want anything whatsoever to be left over from that program beyond the latter date. This is shown by its action in connection with the Supplemental Appropriations Act, 1954, when on August 3, 1953 it appropriated the stabilization agency just enough funds to close its offices in that month.

III.

Again upon the assumption that the Act authorized administrative determination of violations and even upon the further assumption that such authority continued after October 31, 1953, the administrative proceeding would be illegal. This is so because the basic regulations under which the agency purports to have power to act are in conflict with various provisions of the Act; they are therefore invalid, and this vitiates the entire proceeding.

These procedural regulations and orders are in conflict with the Act in the following respects:

(a) Under Section 709 of the Act, Congress required that "any rule, regulation or order . . . issued under authority of this Act *shall be* accompanied by a statement that in the formulation thereof there has been consultation with industry representatives . . . and that consideration has been given to their recommendations" (emphasis added). This provision expressed the Con-

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gressional intent (compare Sec. 404), in an attempt to make undesirable controls acceptable, to give those to be affected by the program an opportunity to advise the administrative agency in the promulgation of all regulations. Yet, General Order 15 (setting forth the standards for disallowance), General Order 18 (establishing the National Enforcement Commission), and the General Procedural Regulation No. 1 (specifying the procedures to be followed in disallowance proceedings)—all of which were adopted under the proposed administration by the Office of Defense Mobilization—did not contain the required statements of consideration and are, therefore, invalid.

(b) By the 1952 amendments to the Defense Production Act of 1950 Congress created (Section 403(b)) a statutory tri-partite Wage Stabilization Board, with primary responsibility for administration of the wage stabilization program, under the supervision and direction of the Economic Stabilization Agency. From and after December 6, 1952, when the chairman and industry members resigned, there was no such board. Thereafter, by General Order 19 an attempt was made, contrary to the mandate of the statute, to lodge its powers in an all public member Wage Stabilization Committee.

(c) Section 405(b) authorized the President to prescribe the extent to which "any wage . . . payment made in contravention of any such (stabilization) regulation" shall be disallowed. But General Order 15 went further and provided that not only the payment in contravention, but the entire wage paid, including that part which was in excess of the permissible wage, was to be considered as illegal and subject to disallowance.

(d) Finally, while Section 405(b) contained no language permitting the retroactive specification of the penalty, by General Order 15 it was provided that the illegal wages to be disallowed could even include those paid prior to the time that the order was issued, as far back as January 26, 1951.

IV.

Under Section 405(b) of the Act, Congress delegated to the President the authority to prescribe the extent to which payments in violation of wage stabilization should be disallowed as a cost deduction under the income tax and other laws. Congress failed, however, to specify any standards to control the exercise of this power. Thus, it left him free to impose any arbitrary standard he chose, such as basing the amount of the penalty on the industry of the employer, the number of employees, the employer's geographic location, and so on. The President did in fact impose an arbitrary test (which we will assume, for purposes of the present argument, was authorized by the statute). That standard was, basically, the total wage paid when any part thereof was illegally raised. (Disallowance of anything less was permitted only when there were extenuating and mitigating circumstances.)

Thus, the penalty prescribed was unrelated to the seriousness of the violation or to any other fair test. To illustrate, assume two employers under the identical circumstances each illegally increased the wages of the same number of employees ten cents an hour. With the increase,

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the base rate of each of the employees of the ABC Company was $1.00, whereas the base rate of the employees of XYZ Company, which had always prided itself in paying a good wage, was $2.00 an hour. The total wages to be disallowed for the identical violation would be twice as great in the case of the XYZ Company! Nor is that all. If we further assume that the ABC Company had an income tax loss in the year in question at least as great as the amount of the disallowance, and that the XYZ Company was subject to the excess profits tax, the former would in fact suffer no penalty since the disallowance would not cause it to pay any income tax whereas the latter could have its income tax increased 82¢ for each dollar of disallowance! Moreover, as illustrated by the instant case, the President claimed the power under the Section to impose a disallowance penalty of millions of dollars on an alleged individual violator. Further, it is claimed that he had authority to assess such a penalty in an administrative proceeding without a jury trial, and without allowing any judicial review of his determination.

In thus authorizing the President to institute wage stabilization controls and to impose the penalty claimed for violations of such controls, we submit the Defense Production Act of 1950, and particularly Section 405(b) thereof, contravenes the following provisions of the Constitution: Article I, Section 1; Article I, Section 9, clause 4; and the Fifth, Sixth or Seventh, Eighth, and Tenth Amendments.

V.

While the trial court based its decision on the ground that the Act placed jurisdiction in the federal courts and not any agency (Point I, above), and therefore found it unnecessary to rule on the other issues raised, the invalidity of the proceedings on any one of the four principal grounds heretofore discussed requires an affirmance of the decree below.

Appellants argue that no injunction should have been granted because Appellee failed to exhaust its administrative remedy. But here there was no valid administrative remedy to pursue, let alone exhaust. The so-called exhaustion principle is not applicable at all where, as here, the administrative agency has no authority under the statute to hold any hearing, or the statutory authority has expired, or the regulations and orders under which the agency purports to proceed are otherwise invalid as being in conflict with the statute and unconstitutional. Moreover, the exhaustion argument is particularly inapplicable where the agency, by its own governing regulations asserts, as in the instant case by General Order No. 15, that after exhaustion of the administrative proceeding its decision may not be reviewed in any court.

Further, Appellee has in fact exhausted any so-called administrative remedy. The Enforcement Commissioner was enjoined from holding or hearing only after he had denied Appellee's motion to dismiss the proceeding based on the grounds later urged to the court. Also, the regulations of the National Enforcement Commission, as it

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has held in a number of cases, specifically preclude it from considering such issues.

Finally, and in any event, irreparable injury, as Appellants recognize (p. 17), "is sufficient to make the doctrine of exhaustion of remedies inapplicable." There is such irreparable injury here, proved beyond question upon trial. Thus, aside from other evidence of irreparable injury, the record establishes that the nature of Appellee's operations is such that it is dependent upon weekly bank loans to meet its payroll and that if the administrative hearing had been permitted to continue and the Enforcement Commissioner had made findings supporting the allegations of the complaint and determined that the alleged illegal excess wage, or any greater amount, be disallowed for income tax purposes, the banks would have withdrawn their credit and Appellee could not have continued its operations. So, even assuming, contrary to the established facts, that Appellee would then have been financially able to appeal the Enforcement Commissioner's decision, and further assuming that it could ultimately obtain court review of the agency's decision, the damage would have been done. In this respect the instant case is basically distinguishable from *Franklin v. Jonco Aircraft Corp.*, 346 U.S. 868, 74 S.Ct. 126 (1953) and all of the other cases which have enjoined National Enforcement Commission hearings. Under all these circumstances the trial court properly enjoined the illegal and invalid administrative hearing and the decree should be affirmed.

ARGUMENT.

I.

The Defense Production Act of 1950 Authorized the Courts, Not the Executive, to Determine Whether the Act Had Been Violated.

A. The Clear Language of the Act Places Jurisdiction to Determine Violations in the Federal Courts.

The Appellants assert that under the Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App. §§ 2061 *et seq.* (Supp. V 1952)) the President has the authority and power to adjudicate whether an employer has violated wage stabilization regulations issued under Title IV of the Act. This alleged authority he purportedly delegated to an administrative agency, the National Enforcement Commission. The statutory three-judge district court held that the Act does not confer such an adjudicatory power on the Executive but places solely in the federal courts the jurisdiction to determine violations of the Act [R. 33-37].

1. *Section 405(b) merely authorizes the Executive to prescribe by general regulations the measure of disallowance by the executive departments.* The asserted source of authority of the National Enforcement Commission to pass judgment on alleged violators is contained in Section 405(b) of Title IV of the Act (64 Stat. 798, 807 (1950), 50 U.S.C. App. § 2105(b) (Supp. V 1952)), which provides:

> "No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contraven-

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> tion of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation."

This Section, it is submitted, cannot possibly be interpreted as lodging with the Executive power to try alleged violators and adjudge whether they did or did not contravene the Act or the regulations.

The second sentence of this Section delegated to the President only the authority to prescribe by general regulation what part of wage payments duly found to have been made in violation of the Act or regulations should be disregarded by the other executive departments in determining the employer's costs or expenses under other laws. Acting under the authority of this sentence, the President, by the Economic Stabilization Administrator, did issue such a general regulation. General Order 15 of Economic Stabilization Administrator, issued April 3, 1952, 17 Fed. Reg. 2994, 9977 (Aplts. Br. Apdx. pp. 89-93). Therein it was provided, by Section 4(b), that "the amount paid or accrued in violation of the act or regulations . . . which may be disallowed and disregarded shall be the entire amount of the wage . . . and not merely the amount paid or accrued in excess of the legal maximum" and that where there were "extenuating and mitigating circumstances" of the type listed, "the usual and general policy shall be to disallow an amount at least equal to that portion of any payment or accrual in excess of whatever payment was permissible under the governing regulation . . . ." Section (4a) provided that such disallowances may be made for the purposes of calculating deductions under the income tax, costs and

expenses under Government contracts, maximum prices under the Act, and/or costs or expenses under any other law. By the above provisions of this General Order the Executive exhausted all his authority under the second sentence of Section 405(b).

We cannot find in that sentence any language possible of an interpretation further empowering the President to adjudicate whether each alleged violator had in fact contravened the Act. The language, "the President shall *prescribe* the extent to which" illegal wage payments shall be disregarded does not grant him adjudicatory, as distinguished from regulatory, power. The word, "prescribe" means (*2 Webster's New International Dictionary* 1954 (2d ed., unab., 1947)):

> "To lay down authoritatively as a guide, direction, or rule of action; to impose as a peremptory order; to dictate; direct; ordain; as to *prescribe* regular hours of study."

This definition has received wide judicial acceptance. See, *e.g., Scrier v. Riley*, 198 Cal. 170, 175, 244 Pac. 323 (1926); *Smith-Brooks Co. v. Young*, 103 Colo. 199, 203, 85 P.2d 39 (1938); *Alsop v. Pierce*, 155 Fla. 184, 190, 19 So.2d 799, 803 (1944); *Koenig v. Flynn*, 258 N.Y. 292, 300-01, 179 N.E. 705, 707 (1932); *Commonwealth v. Old Dominion Power Co.*, 184 Va. 6, 15, 34 S.E.2d 364, 368 (1945); *State v. Seattle Nat'l Bank*, 130 Wash. 69, 226 Pac. 259 (1924).

Thus, "prescribe" can only be construed as authorizing the President to publish "a guide, direction, or rule of action" such as he did by General Order 15. Neither the word "prescribe" or any other language in the sentence under consideration can be stretched to include a meaning

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of trial and decision or hearing, findings and penalty. If Congress, in lieu of the word "prescribe" had used such terminology as "adjudicate," "find," or, perhaps, even "determine" or "decide" a plausible (though not convincing) argument could be made that the grant of authority included the power to hear and decide the issue of individual violations. But the terminology actually used can only mean the issuance of a general principle to control in the adjudicatory process.

The Appellants argue (Aplts. Br. p. 42) that "it is clear from the provision in question that the disallowance in individual cases were initially to be *determined* 'by the executive departments and other governmental agencies'" (emphasis added). We cannot follow this reasoning, which is based upon an obviously incorrect paraphrasing of Section 405(b)'s language. The Section does not so provide, or contain any language susceptible of such a construction. It does not contain the concept of determination at all. Nor does it grant any power or authority to "the executive departments and other governmental agencies." Expressly, literally, and by any reasonable intendment it merely permits the President to issue a general rule as to the extent wages paid in violation shall be taken into account for penalty purposes, as found by the appropriate tribunal, and thereafter disregarded by "the executive departments and other governmental agencies."

The difficulties with Appellants' construction of Section 405(b) lie not only in what the Section says, but in what it omits. Despite the widespread use of the administrative process in modern times, we submit that the grant of authority to an administrative agency to hear and de-

cide individual cases and to impose penalties may not be inferred.[3] In view of the many statutes in which Congress has explicitly provided for administrative adjudicatory powers, it is inconceivable that Congress would here have intended a grant of such power without having so provided in unmistakable language. Despite the need for the administrative hearing and determination in many situations, the process is frequently looked on with disfavor because of the deprivation of the right to a jury trial, the loss of protection from the usual rules of evidence, the lack of formalized procedures, the frequent placing of the burden of proof on the alleged violator,[4] the frequent use of temporarily appointed hearing officers, and the other departures from traditional judicial concepts. So far as violations of wage stabilization regulations are concerned, as contrasted with a maximum fine of $10,000 (and/or one year's imprisonment) for a willful violation (*cf. United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S.Ct. 227 (1952)), the disallow-

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[3]An agency's powers are, of course, limited to those granted by statute. *Neuberger v. Commissioner*, 311 U.S. 83, 89, 61 S.Ct. 97, 101 (1940); *FTC v. Raladam Co.*, 283 U.S. 643, 649, 51 S.Ct. 587 (1931); *Waite v. Macy*, 246 U.S. 606, 38 S.Ct. 395 (1918).

[4]Compare Wage Stabilization Press Release WSB-273 of September 11, 1952, Interpretation Bulletin No. 22 of October 1, 1952, par. 5B4-5 (7 LRR-WHM 100:412i). General Wage Regulation 5 of February 12, 1951 (16 Fed. Reg. 1507), authorized employers to grant wage increases, within certain limits, as a reward for merit or length of service. Yet by the Press Release, the Wage Stabilization Board a year and a half later, with reference to General Wage Regulation 5, stated:

> "All increases are presumed to be general unless the employer asserts and shows that the increases were permissible on another basis such as individual increases for merit or length-of-service."

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ance penalty could, as possibly in the instant case, run into several million dollars. Yet the Appellants would have us believe that Congress intended to grant the Executive, as distinguished from the judiciary, the power to decide individual cases and impose such a penalty, without affording the alleged violator even the minimum protection of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. §§ 1001 *et seq.* (1946)).[5] Even if it were permissible to construe the language of Section 405(b) as possibly authorizing an administrative adjudication of violations, it would be almost inconceivable to conclude Congress intended such an authorization in view of its failure to specify any standards, guides, or limitations to the administrative process. The clear language of the Section, however, only authorized the Executive to promulgate rules establishing penalties, as he did by General Order 15. It does not grant the Executive adjudicatory powers.

2. *By Section 706(b) Congress granted jurisdiction to the federal courts to determine all violations.* The conclusion that Congress did not intend by Section 405(b) to grant to the Executive power to hear and determine individual violations is fortified by the express grant of jurisdiction to the federal courts and the Attorney General. In this connection, Section 706(b) of the Defense

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[5]Under Section 709 of the Defense Production Act of 1950 (64 Stat. 819, 50 U.S.C. App. § 2159 (Supp. V)), "The functions exercised under this Act shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of Section 3 thereof." This provision rendered the Administrative Procedure Act inapplicable to the administrative hearings expressly provided for in the Act, such as the hearing under Section 602(b) (64 Stat. 813, 50 U.S.C. App. § 2132(b) (Supp. V 1952)) pertaining to violations of credit limitations and specifying "notice and opportunity for hearing."

Production Act of 1950 (64 Stat. 817, 50 U.S.C. App. § 2156(b) (Supp. V 1952)) provides:

> "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall has jurisdiction of violations of this Act or any rule, regulation, order or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder. . . . All litigation arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General."

Thus, the jurisdiction of "violations" of the Act and regulations or of actions to "enforce any liability" created by the Act or regulations (Section 405(b) and General Order 15) is expressly placed in the U.S. district courts in actions to be brought by the Attorney General. Here there is no necessity of assuming power or authority, as Appellants do in connection with Section 405(b). Section 706(b) is express and explicit and grants such power, without ambiguity, uncertainty, or equivocation, to the federal courts and the Attorney General.

Comparing the two sections, Judge Sloan of the United States District Court for the Northern District of Georgia, Atlanta Division, in the case of *Belcher Oil Co. v. National Enforcement Comm'n,* 114 F. Supp. 377, 381-82 (1953), observed:

> "It seems that under the guise of authority granted to the President to 'prescribe the extent to which' wage payments made in violation of a regulation or order shall be disregarded by the Executive Depart-

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ment, that the agency has undertaken to assume the authority to administratively determine violations of the Act, to fix the extent of such violations, to determine that the entire amount of the anual wage should be disallowed, unless extenuating or mitigating circumstances exist, and in such case to fix a lesser amount not less than the excess payment, and to make such administrative determination final, conclusive and binding upon other departments and agencies. This is true notwithstanding the express provision of Section 706(b) of the Act, 50 U.S.C.A. Appendix § 2156(b) which provides:

* * * * * * * *

"This Court is presently of the opinion that the Act did not authorize the President to determine whether such wage adjustments were made in violation of the Act or the regulations promulgated thereunder, but confined the power of the President to prescribe the extent to which compensation payments in contravention of the regulation should be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of the employer for the purposes of any other law or regulation.

"Consequently, the delegation of this authority by the President to the head of the agency, the Economic Stabilization Administrator, did not confer upon that official powers that the President did not have.

"The National Enforcement Commission had no power or authority to determine administratively that a violation had occurred, or the extent of such violation."

The specific attention which Congress paid to the interrelationship of Section 706(b) and Title IV is highlighted by the provision in the Section that "All litiga-

tion arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General." In commenting on this Section the Conference Committee, having noted the provision with respect to administration of wage and price controls through a new independent agency, said:

> "The House bill provided that any attorneys appointed for these agencies could appear for and represent the agency in any case in any court. Such authority was omitted from the conference substitute in view of the fact that under the provisions of Section 706 as adopted by the Committee of Conference all litigation arising under the Act or the regulations promulgated thereunder was placed under the supervision and control of the Attorney General." H.R. Rep. No. 3042, 81st Cong., 2d Sess. 37 (1950).

3. *Sections 405(a) and 409, as amended in 1951, make it clear that Congress did not intend to authorize administrative determinations of violations under Section 405(b).* Section 405(a) (Aplts. Br. Apdx. p. 80) originally made unlawful the purchase or sale of materials in violation of the price control provisions of the Act, and the 1951 amendment (65 Stat. 136, 50 U.S.C. App. § 2105(a) (Supp. V 1952)) added a provision that the "President shall also prescribe the extent to which any payment made . . . in violation . . . shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any such person for the purposes of any other law or regulation. . . ." At the same time (65 Stat. 136, 50 U.S.C. App. § 2109(d) (Supp. V 1952)) subparagraph (d) was added to Section 409 to provide that the "President shall also prescribe the extent to which"

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any fine for violation of wage or price regulations or any payment in compromise or satisfaction of a price suit "shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any such person for the purposes of any other law or regulation." As we shall see, it is clear that Congress did not in these two provisions authorize administrative determination. A similar conclusion is therefore required as to Section 405(b) which uses the identical language—"The President shall also prescribe the extent to which . . . shall be disregarded by the executive departments."

Section 409(d) deals with disallowance of fines paid for violation of price or stabilization regulations and of amounts paid in satisfaction of over-ceiling price suits. Obviously, in authorizing the President to prescribe the extent to which such payments shall be disregarded by the executive department, Congress did not envision any hearings and findings but only a general, controlling regulation. If, for example, an employer had been found guilty in federal court of violating stabilization regulations and fined $5,000.00, no other hearing and determination would be necessary or conceivable. All that would be needed would be a general order prescribing the extent to which such payments should be disregarded by the executive departments for tax and other purposes. The same would be true where a seller paid a sum of money in satisfaction of a judgment for an over-ceiling sale. Now, if the language in Section 409(d) does not authorize any administrative hearing and finding to determine the extent to which the payment shall be disregarded by the executive departments, how can Congress's prior use

of the identical language in Section 405(b) be held to empower such hearing instead merely of authorizing issuance of a general directive governing all such cases?

It is also clear that Congress, in amending Section 405(a) to provide for disallowance of illegal price payments, did not intend to authorize administrative determination of violations. In connection with price controls Congress provided in the Defense Production Act of 1950 for an elaborate procedure for challenging price regulations and review thereof by the Emergency Court of Appeals. Under Section 408(d) (64 Stat. 808, 50 U.S.C. App. § 2108(d) (Supp. V 1952)) it was provided that "The Emergency Court of Appeals . . . shall have exclusive jurisdiction to determine the validity of any such regulation or order" and that, "Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order." Subsection (e) followed by providing for a challenge of the validity of a price regulation before the Emergency Court, if the challenge was made within a specified time after arraignment or judgment "in any civil or criminal proceeding, brought pursuant to sections 409 or 706 of this Act. . . ."[6]

If Section 405(a) were interpreted to authorize violations to be administratively determined, there would be no opportunity to challenge price regulations in disallow-

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[6]Under the 1952 amendment of Section 408, subsection (b) was stricken so that subsections (d) and (e) became subsections (c) and (d) respectively, 66 Stat. 302.

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ance proceedings.[7] The anomally would result that a person sued for a 10-cent ceiling price violation might challenge the validity of the regulation allegedly violated, while one against whom an administrative board asserted a disallowance penalty of thousands of dollars would have no opportunity to challenge the regulation's validity in any court! Of course, such a discriminatory construction of the statute is avoided by recognizing that Congress intended that determinations of price violations under Section 405(a) should be made by the federal courts pursuant to the grant of jurisdiction in Section 706. The amendment of Section 405(a) thus confirms the district court's construction in the instant case of Section 405(b).

Appellants, anticipating the above analysis of the meaning of Sections 405(a) and 409(d), have attempted to furnish support for their construction of 405(b) with the argument that "Congress added administrative disallowance as an enforcement method in connection with violation of price regulations, specifically recognizing that, prior to that amendment, administrative enforcement had been available only in connection with wage stabilization regulations" (Aplts. Br. p. 19). It is certainly true that Congress did add additional sanctions

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[7]Even if we assume, for purposes of argument, that the defendant could obtain a review of the administrative determination through a suit in the Tax Court or a suit for a tax refund in a district court or the Court of Claims, he nevertheless could not obtain judicial review of the validity of the price regulation. This is true since under Section 408(e) it is only in proceedings brought under Sections 409 or 706 of the Defense Production Act of 1950 (as distinguished from the Internal Revenue Code or any other law) that a reference may be made to the Emergency Court of Appeals. Nor could the Tax Court, district court, or Court of Claims in a tax suit have any power to rule since Section 408(d) vests exclusive jurisdiction in the Emergency Court of Appeals.

for price and wage violations, but there is nothing in these two provisions indicating that Congress intended thereby that the Executive should administratively determine whether a particular individual had violated the law. Appellant's assumption that they authorize an administrative hearing and determination of violation is no more valid than the similar unwarranted assumption that Section 405(b) empowers such a proceeding. When they were enacted in 1951, Congress was not even aware that the Executive purported to have authority to determine administratively whether an individual had contravened the Act and to impose penalties. In detailing the legislative history of these two provisions (Aplts. Br. pp. 62-64), the Appellants' quotations from the record, as distinguished from their broad, unwarranted generalizations, do not disclose any representations to Congress that the Executive intended under Section 405(b), or any other provision of the Act, to administratively determine violations and impose penalties. On the contrary, the Appellants' account of the legislative developments discloses that the earliest report to Congress which might be construed as even suggesting that the Executive was assuming such power was in October, 1951 (Aplts' Br. p. 51). The 1951 amendments containing these two provisions were reported to the Senate on June 21, 1951 (Sen. Rep. 470, 82d Cong., 1st Sess.) and to the House on June 23, 1951 (H. R. Rep. 639, 82d Cong., 1st Sess. 28-29), and were subsequently enacted without change in form. Furthermore, at no time was Congress advised that the Executive claimed that the source of such asserted power was in Section 405(b) itself. In fact, it was not until the Appellants filed their trial brief in this very case on July 24,

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1953 that, so far as we can ascertain, the Government ever alleged such power could be found in Section 405(b).

4. *Section 705(a) does not authorize the Executive to hold violators guilty and impose penalties.* For the first time in their brief filed herein, the Appellants argue (Aplts. Br. p. 76) with reference to Section 705 of the Defense Production Act of 1950 (64 Stat. 816, as amended, 65 Stat. 139, 50 U.S.C. App. § 2155(a) (Supp. V 1952)) that "there can be little doubt that this provision itself fully authorizes the President or his agent to conduct the administrative hearings involved in this case"! No such claim was even asserted in the Statement as to Jurisdiction filed by the Appellants herein. Nor does this argument have any validity whatsoever. On the contrary, it demonstrates the Government's desperation in seeking to find some language in the Act which it can assert gives some color of legality to its administrative proceedings herein involved.

Section 705(a), which of course, is applicable to the controls authorized by various titles of the Act, and not just to Title IV, provides in part:

> "The President shall be entitled, while this Act is in effect and for a period of two years thereafter, by regulation, subpena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or orders issued thereunder. The President shall issue regulations insuring that the

> authority of this subsection will be utilized only after the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority, and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency."

The above provisions do not in any manner authorize, or even contemplate the Executive holding hearings against accused violators to determine guilt and impose penalties. Actually as properly characterized by Appellants (Aplts. Br. p. 76), the Section grants "investigatory powers." As summarized by the Senate Committee reporting on the Defense Production Bill of 1950:

> "Section 705 contains authority to require reports, collect information, and make investigations." Sen. Rep. 2250, 81st Cong., 2d Sess. 11.

That the Executive's authority under the Section is limited to investigatory, as contrasted with adjudicatory powers, is demonstrated by the following language therein:

> (a) The first sentence can only be read as authorizing the President "to obtain such information" as he needs. "Information" is the key to the entire Section.
>
> (b) He can only seek the information after "the purpose of the investigation, inspection, or inquiry" has been defined. This is hardly language of authority to conduct an adjudicatory hearing, determine guilt, and impose a penalty.
>
> (c) Finally, and conclusively, his powers under this Section can only be utilized if "no adequate and authoritative data are available from any Federal or

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other responsible agency." Thus, if the "data," the information, is available from some other source, the President is not to bother the citizen. This limitation makes clear that this Section pertains only to the gathering of information. Actually, the provisions of this Section add weight to Appellee's arguments. Had Congress intended to grant the Executive power under Section 405(b) to try and judge alleged violators, Section 705(a) would have contained some language with reference to the use of such powers, or rules to govern the conduct of such hearings.

In summary, as the statutory three-judge trial court concluded herein [R. 36]:

> "It is sufficient to say that we are unable to perceive in the Defense Production Act any authority for the imposition of penalties by the National Enforcement Commission. To the contrary, the statute vests jurisdiction in the District Courts of the United States of all actions under the Act to enforce any liability or duty created thereby."

B. The Legislative History of the Act Does Not Support the Executive's Claim to Adjudicatory Power.

In apparent recognition of the fact that neither the language of Section 405(b), nor that of any other provision of the Act, authorizes the President to administratively determine whether an employer has violated the Act, the Appellants devote the bulk of their brief on this issue (pp. 43-57) to an attempt to demonstrate that the legislative history of the Act supports their interpretation. And in so attempting, they rely on testi-

mony before subcommittees, appropriation acts, committee reports under a number of different acts extending over a 12 year period, amendments, rejected amendments, and other material. The simple gist of Appellants' argument in this connection is that Congress approves every bit of administrative action of which it theoretically has any knowledge if it fails by specific enactment to repudiate such practice or appropriates any money for the agency. The decisions of this Court do not support such a claim.

Before discussing the legislative history relied upon by Appellants, and which, as we shall see, does not support their position, we will briefly discuss the use of this material. First, and of most importance, is the absence of any legitimate legislative history sustaining the Appellants' interpretation of the Act. Neither the House nor Senate committee's (nor the conference) report on the Defense Production Bill of 1950, or of the 1951 or 1952 amendatory bills, is quoted by Appellants with any language showing Congressional awareness, let alone approval, of an administrative adjudication of alleged violations and imposition of the penalty therefor. The same is true as to the discussion on the floor in the consideration of these bills.

Secondly, we submit, the language of the Act so clearly and unambiguously places jurisdiction over violations in the federal courts that, in accordance with the principles of this Court, resort to legislative history is unnecessary and, indeed, improper. *Ex parte Collett*, 337 U.S. 55, 61, 69 S.Ct. 944, 947 (1949); *Wilbur v. United States*, 284 U.S. 231, 237, 52 S.Ct. 113, 115 (1931); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77,

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83-84, 53 S.Ct. 42, 44 (1932); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-397, 71 S.Ct. 745, 751-752 (1951).

Thirdly, we are not here concerned with long-settled and consistent administrative or judicial interpretation of a statute followed by re-enactment such as was involved in *Helvering v. Winmill*, 305 U.S. 79, 83, 59 S.Ct. 45, 46 (1938); *Commissioner v. Flowers*, 326 U.S. 465, 469, 66 S.Ct. 250, 252 (1945); *Shapiro v. United States*, 335 U.S. 1, 16, 68 S.Ct. 1375, 1383 (1948), and other similar cases relied upon by Appellants (Aplts. Br. pp. 48-49). As we shall see, there has been no judicial interpretation. And we do not have a situation here such as is involved in the Treasury and similar cases where the administrative agency, in pursuance of its duty of issuing regulations interpreting the statute, adopts a not unreasonable construction. Here the question is whether or not the agency has any power at all to act. The administrative action here involved is not the interpretation of a specific provision of the Act but merely the naked arrogation of power which has no support whatsoever in any of the language of the Act.

Finally, in connection with the Appellants' appropriation act argument (Aplts. Br. pp. 52-57), we do not have a situation where the appropriation act itself, as in the case of *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129 (1947) and the other cases cited by Appellants (Aplts. Br. p. 57), expressly approved the disputed authority. As this Court observed in *Ex parte Endo*, 323 U.S. 283, 303 (n.24), 65 S.Ct. 208, 219 (1944), "the appropriation must plainly show a purpose to bestow the precise authority which is claimed."

The Appellants do not even claim, as they conscientiously could not, that the Supplemental Appropriations Act of 1954 (67 Stat. 418) or any other appropriations act expressly recognized the authority or existence of the National Enforcement Commission or of the President or any of his agencies to determine an accused has violated wage stabilization and impose a penalty.

1. *Similarity of Section 405(b) with the Stabilization Act of 1942 does not indicate Congressional approval of administrative adjudication of violations.* It is true, as Appellants point out (Aplts. Br. pp. 43-44), that Section 405(b) of the Defense Production Act of 1950 is substantially identical with Section 5(a) of the Stabilization Act of 1942 (56 Stat. 767, 50 U.S.C. App. § 965(a) (1946)), but it does not follow from this circumstance that Congress intended thereby to authorize the administrative determination of violations, such as was practiced under the 1942 stabilization act.

Preliminarily it should be observed that the practice under the Stabilization Act of 1942 of the tri-partite War Labor Board determining violations of the Act and regulations was itself of doubtful validity. Thus, in this connection, the former Executive Director of the War Labor Board concluded:

> "The very broad and practically undefined authority granted by the Stabilization Act to the President, not only to set up the Stabilization rules but also to prescribe the penalties for violation, represented a departure from normal legislative practice. The further delegation of wide enforcement powers to the Board, as provided in the regulations of the Economic Stabilization Director, raised a specter of unconstitutionality which haunted some members of

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the Board's legal staff throughout the period in which the Stabilization Act was in force. (Footnote 7): The constitutionality of the Board's enforcement powers could conceivably have been challenged on several grounds. It might have been contended either that the statutory delegation of authority to the President was too broad, or that the rules and regulations implementing the statute were improper and illegal. . . ." *Problems & Policies of Dispute Settlement & Wage Stabilization During World War II,* Bull. No. 1009, U.S. Dept. of Labor (1950) 354.[8]

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[8]The usurpation of powers, not authorized by the statute, was recognized by a congressional committee in connection with the grant by the President to the War Labor Board of labor dispute settling responsibilities. A House committee concluded, on January 26, 1944, in this connection:

"It is important to note that no statutory authority existed for the creation of the National War Labor Board. It is the opinion of your committee that the War Labor Board had no legal authority to issue orders or directives binding upon anyone until the passage of the War Labor Disputes Act (P.L. 89, 78th Cong., 1st sess.) and only then in accordance with the provisions of the Act.

* * * * * * *

"As has heretofore been pointed out, no statutory authority existed for the appointment of the National War Labor Board until the enactment of the War Labor Disputes Act on June 25, 1943. Prior to that time the Board's orders and directives were in violation of Article I, section 1, of the Constitution of the United States, which provides: All legislative [*i.e.,* law-making] powers herein granted shall be vested in the Congress of the United States which shall consist of a Senate and House of Representatives." *Fourth Intermediate Report of the Select Committee to Investigate Executive Agencies, pursuant to H. Res. 102,* 78th Cong., 2d Sess., pp. 6, 11.

Similarly, in more recent years, the President, purporting to act under the Defense Production Act of 1950, attempted to grant the same powers to the Wage Stabilization Board (Executive Order No. 10161, September 9, 1950, 15 Fed. Reg. 6105), though the agency representatives later acknowledged that there was no statutory authority for such alleged grant of power. 97 *Cong. Rec.* 7692.

And contrary to the implications in Appellants' Brief (p. 49, n.28) the validity of the administrative determination of violations by the War Labor Board under the World War II legislation was never judicially determined. The case of *Troy Laundry Co. v. Wirtz*, 155 F.2d 53, 55 (9th Cir.), *cert. denied*, 329 U.S. 723, 67 S.Ct. 66 (1946) involved only the subpena power of the War Labor Board. And, in this connection, the War Labor Disputes Act of June 25, 1943 (57 Stat. 163, 50 U.S.C. App. §§ 1501 *et seq.* (1946)) gave statutory authority to the War Labor Board and expressly conferred subpena powers. In *N. A. Woodworth Co. v. Kavanagh*, 102 F.Supp. 9 (E.D. Mich. 1952) *aff'd per curiam*, 202 F.2d 154 (6th Cir. 1953), and *Weather-Seal Mfg. Co. v. Commissioner*, 16 T.C. 1312 (1951), *aff'd mem.*, 199 F.2d 376 (6th Cir. 1952), both involving the Stabilization Act of 1942, neither the Sixth Circuit nor the lower courts decided (nor was the question even raised) whether the Act authorized the administrative finding of violations and imposition of penalties. It is not surprising that there was no test of such asserted power under the Stabilization Act of 1942. In view of the tri-partite character of the War Labor Board and its panels, the industry and labor members (who had the majority voting power) would not permit a heavy penalty. *Problems & Policies of Dispute Settlement & Wage Stabilization During World War II*, Bull. No. 1009, U.S. Dept of Labor (1950) 243, 362, 365; *I Termination Report of the National War Labor Board* (1946) 430-431. As indicated by the figures submitted by Appellant (Aplts. Br. p. 49), the average disallowance was only $300.00. Under such circumstances employers could hardly afford to test

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in the courts the legality of the War Labor Board penalty proceedings.

But however interesting it may be to speculate as to the legality of the proceedings under the Stabilization Act of 1942 and the President's constitutional powers during a war for survival, that experience actually has no relevance to the instant issue. In the first place, it is not clear that Section 5(a) of the Stabilization Act of 1942 was alleged to be the source of asserted power to administratively determine violations and impose penalties. The regulations of that period and the quotations from congressional reports, set forth by Appellants, do not cite such a source. Secondly, and of paramount importance, the Stabilization Act of 1942 contained no provision vesting jurisdiction over violations in the federal courts, such as is found in Section 706(b) of the Defense Production Act of 1950 (*supra*, p. 26). Here we have a basic difference in the two statutes which renders completely invalid any claim that Congress intended by the later statute to authorize administrative determination of violations. As a matter of fact, the only conclusion to be drawn with reference to the Stabilization Act of 1942 in connection with this problem is that Congress demonstrated an intent to repudiate any possible assertion of administrative authority to impose penalties by specifically granting jurisdiction to determine violations of Section 405(b) of the Defense Production Act of 1950 to the United States District Courts.

Recognizing the force of the logic that the provisions of Section 706(b) completely destroy any analogy to the Stabilization Act of 1942, the Appellants have desperately sought to explain away the significance of that

provision (Aplts. Br. pp. 60-61). Their efforts to do so by comparison with certain sections of the Emergency Price Control Act of 1942 (56 Stat. 23, 33, 50 U.S.C. App. §§ 901 *et. seq.* (1946)) is clearly unconvincing. In the first place, the scope of Section 706(b) of the Defense Production Act of 1950 (*supra*, p. 26; Aplts. Br. Apdx., pp. 84-85) is not "substantially the same" (Aplts. Br. p. 61) as Section 205(c) of the Emergency Price Control Act of 1942 (Aplts. Br. Apdx. pp. 78-79). It is very much broader, as a comparison of the language readily shows. But most important, the provisions of the Emergency Price Control Act of 1942 have no bearing on this problem. It was the Stabilization Act of October 2, 1942 (56 Stat. 765, 50 U.S.C. App. §§ 901 *et seq.* (1946)) which authorized the President to stabilize wages during World War II. It was Section 5(a) of that Act (not the Emergency Price Control Act of January 30, 1942) which was similar to Section 405(b) of the Defense Production Act of 1950 (Aplts. Br. p. 44). And the Stabilization Act of 1942 contained no provision, such as Section 706(b) of the Defense Production Act of 1950, giving the federal courts jurisdiction for any purposes (nor did Section 205(c) of the Emergency Price Control Act of 1942 extend jurisdiction to the federal courts in any respect in connection with wage stabilization violations). Thus, the 1942 wage stabilization legislation made no provision for federal court jurisdiction. By way of contrast, the 1950 wage stabilization legislation specifically granted jurisdiction to the federal courts and the Attorney General over "violations" of the Act and regulations and actions to "enforce any liability" under the Act or regulations. Thus, it is clear that the practice under the 1942 legislation did not receive

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approval, but rather was repudiated by the 1950 legislation.

2. *Legislative events since enactment of Section 405 (b) do not support the asserted adjudicatory power of the Executive.* The Appellants purport to find support for their contention in the legislative developments since the original enactment of Section 405(b) in 1950 (Aplts. Br. pp. 49-64). The events relied on, however, do not justify their conclusion therefrom.

Preliminarily we should point out that the National Enforcement Commission of the Economic Stabilization Agency was established on July 28, 1952 by the Economic Stabilization Administrator's General Order No. 18 (17 Fed. Reg. 6925, Aplts. Br. Apdx. pp. 94-97). Up to June of 1952 (the month of enactment of the 1952 amendments to the Defense production Act of 1950), the prior National Enforcement Commission of the Wage Stabilization Board had issued but two decisions that had been published (on April 21, 1952 by the Bureau of National Affairs, in its Labor Relations Reporter, Vol. 7, pp. 100:1151-64; compare Appellants Brief, p. 53, n.32).

It is true, as Appellants point out (Aplts. Br. p. 50), that in 1951 Congress added the additional sanction of disallowance by the executive department (upon judicial determination of violation) to price violators and provided for the disallowance (principally for income tax purposes) of fines, etc. paid for violations of wage and salary stabilization. However, as we have shown above (pp. 28-32), these provisions do not support Appellants' interpretations.

The quotation from the Conference Report on the 1952 Amendment to the Defense Production Act of 1950

(Aplts. Br. p. 52), will not, we are sure, mislead the Court as it apparently has the Appellants. Of course, the Wage Stabilization Board, under the Economic Stabilization Agency, had enforcement duties under the Act and regulations. Thus, it made investigations to uncover violations; it informally induced violators to cease their contravention; it carried on a public information campaign to encourage compliance, and so on. But such enforcement functions are far different in character than the authority to try alleged offenders and impose penalties for violations. The Administrator of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.* (1946)) is charged with the duty of enforcing that Act. He makes investigations, obtains compliance when violators are uncovered, and so on. But he has no power and authority to hold hearings on charges against alleged violators or impose penalties for violations. He must bring such a proceeding in the federal courts. The same is true of scores of federal statutes. Enforcement functions by the administrative agency do not include the power to judge and impose penalties for violations. The same is true under the Defense Production Act of 1950 relative to wage stabilization violations, and the Conference Report referred to does not contain anything even indicating the contrary.

It is also true that a handful of members of a House Subcommittee and the Senate Appropriations Committee learned in 1953 that the National Enforcement Commission of the Economic Stabilization Agency was holding hearings to determine violations (Aplts. Br. pp. 52-57). However, the resulting action of these commitees and of Congress was a repudiation of the Agency's practice in

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holding such hearings. The Senate Appropriations Committee considering the Supplemental Appropriations Bill, 1954, clearly recognized (at a time when the existence of the agency was, under Section 717(b)(3), to continue to October 31, 1953) that jurisdiction to proceed with wage and salary stabilization cases involving alleged violations rested solely with the Department of Justice under Section 706(b) of the Defense Production Act of 1950 when it refused to appropriate funds for the liquidation of the Economic Stabilization Agency and stated:

> "It is the sense of the committee that pending cases should be turned over to the Department of Justice for review so that the agency will not be continued by a continuation of these suit." (Sen. Rep. No. 677, 83d Cong., 1st Sess. 17 (1953)).[9]

Further, contrary to Appellants' assertion (Aplts. Br. p. 57) that the funds restored by conference were "concededly to be used in part for the winding up of pending wage enforcement proceedings," the final action

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[9]The Senate Committee report was issued just four days after the Committee had heard the statements of Holland which are relied on so heavily by Appellants! (Aplts. Br. pp. 54-56). Of course, in full context, these statements of Holland could not be understood even as dealing with, much less as "conceding," the validity of administrative trial of alleged violators. His point was that in continuing to carry on its business as usual, the Agency was not "liquidating" in accordance with the mandate in Sections 717(a) and 717(b)(3) of the Act (Aplts. Br. Apdx. pp. 86-87) and was discriminating among the employers who had allegedly committed some violation and particularly those who had dared to challenge in court the authority of the Agency. Both he and Fleming pointed out the pendency of a number of cases challeging the validity of the administrative action, including the instant case which went to trial on the following day, July 24, 1953. And the members of the Senate Committee on Appropriations clearly recognized that the issues presented were for the courts to decide. *Hearings before Senate Committee on Appropriations on Supplmental Appropriation Bill, H. R. 6200,* 83d Cong., 1st Sess., 424-34 (1953).

on the appropriation, we submit, repudiated the agency's assertion of authority to hold wage stabilization violation penalty hearings. Bearing in mind that the chief function of the Economic Stabilization Agency at the time was in connection with rent control and that as of July, 1953 there were 146 cases of alleged wage stabilization violations pending in various stages before the National Enforcement Commission,[10] the appropriation finally voted did not include any sums for continuing such hearings but clearly contemplated the prompt liquidation of the Agency. In this connection, as pointed out by Senator Bridges, the Chairman of the Senate Appropriations Committee, in order to pay terminal leave and close the Economic Stabilization Agency as of July 31, 1953, the agency needed $1,144,770. An appropriation of an additional $355,730 (a total of $1,500,000) would have permitted a skeleton staff only to continue until the formal expiration date, October 31, 1953.[11] However, Congress finally on August 3, 1953 appropriated only $45,230 (a total of $1,200,000) over the amount required to cease all activity as of July 31, 1953 (67 Stat. 433). This was

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[10] *Id.* at 430.

[11] Mr. Bridges. Mr. President, I point out that this is salaries and expenses for the Economic Stabilization Agency carried in this bill. I should like to have the Senate understand the situation, so there will be no misunderstanding as to what we are doing.

The Senate committee provided $900,000. I have talked with Mr. Fleming of the General Services Administration, with General Persons, and with others regarding this particular item. Yesterday they showed me the figures as to what would be required if this agency were to close tomorrow, July 31. In order to pay terminal leave and close on July 31, $1,144,770 would be required.

I think we are fooling ourselves if we do not handle this problem in a realistic manner. We must provide enough money so that the agency can be liquidated. Certain parts of it can be con-

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barely enough to permit the immediate closing of all offices, and certainly did not include funds for continuing administrative hearings. The only possible conclusion to be drawn from this bit of legislative history is that Congress was impatient with the Economic Stabilization Agency and directed it to cease its functions immediately.

Thus, the "legislative history"—particularly the absence from the 1942 wage stabilization legislation of any provision comparable to Section 706(b) of the Defense Production Act of 1950 and the repudiation of the Economic Stabilization Agency's activity by the Supplemental Appropriations Act of 1954—strongly indicates congressional disapproval of administrative trial of alleged violators. But, in any event, Section 405(b) does not grant such authority. Nor should such authority be implied, particularly in view of the express provisions of Section 706(b) giving the federal courts and the Attorney General jurisdiction over wage stabilization violations. Thus, the attempt of Appellants to hold an administrative hearing to determine whether Appellee has violated the wage stabilization regulations is a usurpation of power not granted by Congress and is illegal and void.

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tinued in the vitally affected areas, for the duration of the extension provided by law. The Senator from New Hampshire, without having an opportunity to talk with all the members of his committee, is offering this amendment as a result of the new information. I do not wish to assume authority which I do not have.

* * * * * * * *

Mr. Hayden. How much of this money is for terminal leave?

Mr. Bridges. I am told that if the agency were closed as of tomorrow night, and terminal leave were paid, $1,144,770 would be required. I am told that a skeleton staff could be continued until the formal expiration date, assuming that the large group is liquidated now, for the amount which I have suggested in the amendment which I have offered, which is $1,500,000." 99 *Cong. Rec.* (daily ed.) 10712 (July 30, 1953).

In conclusion it should be noted that the interpretation of Sections 405(b) and 706(b) urged by Appellee avoids some of the serious constitutional issues presented under the Appellants' view, as hereinafter discussed.

II.

"All Authority" of the Executive and of Any Administrative Agency Under the Act Expressly Terminated on April 30, 1953, Except "for Purposes of Liquidation," Which Limited Authority Expired on October 31, 1953.

Even if it be concluded that under Section 405(b) of the Defense Production Act of 1950, the Executive was authorized to hold administrative hearings to determine whether or not an accused employer had violated wage stabilization regulations, the judgment of the district court herein must, nevertheless, be affirmed. This is so because any authority the President may have had in this regard ceased under the express provisions of the Act on April 30, 1953, or at the very latest, on October 31, 1953. In this subdivision of our brief we shall assume, for purposes of argument, that Section 405(b) did in fact authorize an administrative adjudication of violations and imposition of penalties for contravention of wage stabilization regulations.

A. Under Section 717 of the Act All Wage Stabilization Authority Expressly Terminated on April 30, 1953, With Complete Liquidation of Any Agency Required by October 31, 1953.

Wage and price stabilization was considered at best, by Congress, as a necessary evil to be endured no longer than necessary. It was intended to be applied sparingly, judiciously, and with extreme care (Sections 401, 402,

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708; 64 Stat. 803, 818, 50 U.S.C. App. §§ 2101, 2102, 2158 (Supp. V 1952)), and to terminate, either by the expiration of a specified time or by prior Presidential or Congressional action at the earliest possible moment. The Congressional concern that the Stabilization authority not be used to oppress the citizen unduly is illustrated by its admonition to the Executive "to avoid burdensome and unnecessary reporting and record keeping" (Section 412, 66 Stat. 304 (1952)).

That Congress sought to relieve the citizen as early as possible from the burdens, headaches, and perils of stabilization is shown by its statement (Section 412) that, "It is hereby declared to be the policy of Congress that . . . the general control of wages and prices shall be terminated as rapidly as possible consistent with the policies and purposes set forth in this Act." By the Defense Production Act Amendments of 1952, 66 Stat. 296, approved June 30, 1952, Congress extended the various provisions of the Act. While certain titles of the Act were thereby extended in effect to June 30, 1953, Congress provided that Title IV, entitled "Price and Wage Stabilization" (and including Section 405(b)), and the related Title V, entitled "Settlement of Labor Disputes," should terminate on April 30, 1953, two months earlier! In 1953, Title VII (except Section 714) and certain other provisions (not including Titles IV or V) were extended to June 30, 1955 (67 Stat. 129, 131).

Thus, Section 717 (50 U.S.C. App. § 2166 (Supp. 1953)) of the Act presently provides relative to termination as follows:

> "(a) Title I (except section 104), title III, and title VII (except section 714) of this Act, and all

authority conferred thereunder, shall terminate at the close of June 30, 1955. Section 714 of this Act, and all authority conferred thereunder, shall terminate at the close of July 31, 1953. Section 104, title II, and title VI of this Act, and all authority conferred thereunder, shall terminate at the close of June 30, 1953. Titles IV and V of this Act, and all authority conferred thereunder, shall terminate at the close of April 30, 1953.

"(b) Notwithstanding the foregoing—

* * * * * * * *

(3) Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency."

Under the express provisions of the Act, then, Title IV (including Section 405(b)) "and all authority conferred thereunder" terminated as of April 30, 1953. Consequently any "authority conferred" by Section 405(b) to hold administrative hearings to determine violations of wage stabilization regulations and impose penalties therefor ceased as of April 30, 1953. Although the holding of such hearings would not appear to be a proper "liquidation" function, in any event, the administrative agency itself had to cease functioning, under Section 717(b)(3), not later than October 31, 1953.

This is the clear and express mandate of Congress in accordance with its will to rid the citizenry of the restraints, hardships, and inequities that inevitably result under such a control program. Appellants resist the inevitable consequences of this clear Congressional language because of their aversion to Appellee's receiving what they characterize (Aplts. Br. pp. 67, 70) as a "legislative"

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or an "automatic pardon." And they open their discussion with the repeated theme that Appellee and other employers for the first time sought injunctions "as this termination date approached" (Aplts. Br. pp. 64, 20).

Now the timing of the instant injunction proceeding (and undoubtedly those involving other employers) was determined by the Agency. Although Appellee was inspected by the Agency as to possible violations in August of 1951 [R. 76], no complaint was issued against it until November 4, 1952! [R. 3, 10, 37]. Following the appointment on January 14, 1953 of Appellant Neal as Enforcement Commissioner to hear the allegations of the complaint, Appellee on January 28, 1953 filed with him a motion to dismiss the complaint upon grounds substantially identical to those raised before the district court [R. 4, 37]. That motion was denied by the Appellant Neal on February 11, 1953 [R. 4, 37], and Appellee then began the present injunction proceeding two days later on February 13, 1953 [R. 1]. Appellee was the first employer to file such an injunction suit. If the Appellants find that delay has somehow worked to their disfavor, they have only themselves to take to task for it.

Undoubtedly the other employers who sought injunctions as soon as they were faced with administrative complaints were influenced to do so, as was Appellee, not by reason of the approaching termination date of the Act, but because of the harsh, shocking and unreasonable decisions being issued by the National Enforcement Commission and because of its usurpation of power and authority in contravention of the intent of Congress. From beginning to end, the stabilization agency indicated a disposition to ignore reason and law. At the outset of the stabilization program, when the labor members of the

Wage Stabilization Board resigned to express their dissatisfaction with the program, the labor members were induced to return to the Board by a modification of policies and, without any statutory authority (see *supra*, p. 39, n. 8), by giving the Board labor dispute settlement functions. Executive Order 10233 of April 24, 1951, 16 Fed. Reg. 3503. At the end, the Board collapsed when the Chairman and the industry members resigned because the President had approved a wage increase for the coal miners which the Board and the Administrator had found to be unapprovable under existing policies (1952 BNA Wage-Hour Rep. 1609, 1619, 1624). The President then purported to create an all public member Wage Stabilization "Committee," contrary to the express provisions of Section 403(b) specifying a tri-partite Board. General Order 19 of Economic Stabilization Agency, issued December 15, 1952, 17 Fed. Reg. 11368. Is it any wonder that employers accused of stabilization violations sought to have their cases heard by the judiciary under the express provisions of Section 706(b) of the Act?

The gist of Appellants' entire argument, particularly as they discuss the alleged powers of the President to transfer the functions of the agency and the General Savings Statute, is that unless somehow they have the authority to proceed, Appellee and some other employers would go unpunished for violation of stabilization regulations.[12] Even assuming that Appellee and these other

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[12]One obvious answer to the Appellants' complete argument on this issue is that if it is held, as Appellee contended in our first point, that jurisdiction to enforce Section 405(b) rests in the federal courts under Section 706(b), then Appellee can still be proceeded against by the Attorney General in view of the savings clause in the latter section saving liability in federal court actions (further discussed at p. 60, *infra*).

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employers did in some way violate Section 405(b), it is the Congressional will that they not be specifically punished therefor. The approach of Congress was that living under stabilization was itself punishment. It wanted the whole thing washed out April 30, 1953.

Of course, under any controls program such as this, there must be a liability cut-off at some date. Whenever that date arrives, there will always be some violators who will escape penalty. Even by the regulation under which Appellants now purport to have authority to proceed (Executive Order No. 10494 of October 16, 1953, 18 Fed. Reg. 6585, discussed *infra,* p. 55), they may only pursue to a "conclusion" those proceedings previously "instituted pursuant to Section 405." Thus, other employers known or suspected of having violated the regulations cannot be proceeded against.

Assuming, as the agency did, that "liquidation" in Section 717(b)(3), quoted above at page 50, included the power to conclude pending administrative enforcement hearings, then the Congressional intent is clear. All violation cases were to be wound up and disposed of within six months after termination of the Act (or longer if controls were terminated, as was the case, in advance of April 30, 1953). In this connection, it should be noted that the principal method (and probably the only one used) of enforcing price controls was the treble damage action under Section 409(b). That Section contains a one year statute of limitations from date of violation. By way of contrast, the administrative enforcement of wage violations under Section 405(b) could continue up until October 31, 1953, a period of almost three years from the date of institution of wage stabilization on

January 26, 1951. In this connection, all but less than two per cent of the alleged violations by Appellee occurred in February and March of 1951 [R. 46-48, 61, 77-78].

Under the Appellants' view, except for the self-imposed limitations by Executive Order No. 10494, they could pursue and proceed against alleged violators of 1951-1953 wage stabilization for an indefinite number of years. It is rather certain that Congress did not intend that such a threat should hang over anyone as a result of a control program which Congress was not enthusiatic to adopt and which it wished to terminate as early as possible. It is far more reasonable to assume that Congress intended that some 20 employers (Aplts. Br. p. 65, note 45) go "unpunished" than that a large number should be in the uncertain position of being proceeded against over an unlimited number of years. *Cf. United States v. Lindsay*, ... U.S. ....., 74 S.Ct. 287 (1954). Further, Appellee, and undoubtedly the other 19 employers, have already suffered a "penalty," in the great expense of this litigation, despite their possible innocence and the fact that the action of the agency is contrary to law, and that they may have given wage increases under pressure from their employees or their union representatives, who are not being proceeded against by the agency. Finally, any willful violator can still be proceeded against under Section 409(b) and the savings clause in Section 706(b) which is applicable to all court proceedings.

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B. No Authority Existed to Transfer Stabilization Functions to the Office of Defense Mobilization.

1. *Executive Order 10494 was not authorized.* Pursuant to the Congressional mandate, the Economic Stabilization Agency and its National Enforcement Commission did cease to function by October 31, 1953. However, by Executive Order No. 10494 of October 16, 1953 (18 Fed. Reg. 6585), the President purported to transfer the functions of that agency to the Office of Defense Mobilization. This order provided:

> "By virtue of the authority vested in me by the Constitution and laws of the United States, including the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*), hereinafter referred to as the Act, and as President of the United States and Commander in Chief of the armed forces of the United States, it is ordered that the functions remaining under Title IV of the Act shall be, and they are hereby, delegated as follows:
>
> "Sec. 1. *Fiscal liquidation.* Such functions as remain in connection with the fiscal liquidation of the Economic Stabilization Agency are hereby transferred to the Secretary of the Treasury.
>
> "Sec. 2. *Administrative proceedings.* The function of conducting administrative proceedings under Title IV of the Act, including the conclusion of those instituted pursuant to section 405 and the taking of necessary action under sections 407 and 408 of the Act, is hereby transferred to the Director of the Office of Defense Mobilization.
>
> "Sec. 3. *Enforcement and investigations.* In addition to the functions now vested in the Attorney General by the Act, he shall have, and they are

hereby transferred to him, the following described functions under Title IV of the Act: (a) completing the processing of enforcement files, (b) concluding investigations where deemed appropriate, and (c) certifying disallowances (section 409(d)).

"Sections 1 and 2 of this order shall become effective November 1, 1953. Section 3 shall become effective immediately."

This attempted transfer of the functions of the Economic Stabilization Agency is without authority in law and is null and void. And there is not, therefore, any administrative agency in existence which has power and authority to hold hearings under Section 405(b) of the Act.

Obviously, the Executive may not transfer such functions without statutory authority. *Cf. Cudahy Packing Co. of Louisiana v. Holland,* 315 U.S. 357, 788, 62 S.Ct. 651 (1942) (Fair Labor Standards Act Administrator could not delegate power to issue subpoenas in the absence of clear statutory language authorizing such delegation); *Fleming v. Mohawk Wrecking & Lumber Co.,* 331 U.S. 111, 67 S.Ct. 1129 (1947). And the theory that the President has some inherent powers "vested . . . by the Constitution" or as "Commander in Chief of the armed forces of the United States" which would sustain such authority was rejected by this Court in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863 (1952).

2. *Section 703(a) does not permit such transfer.* The Appellants assert (Aplts. Br. pp. 69-70, 76-77) support for this transfer of functions under Section 703(a) of the Act (64 Stat. 816, 50 U.S.C. App. § 2153 (Supp. V.

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1952)), which concededly is still in effect. The Section provides:

> "Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency or agencies (and the President is hereby authorized to create such new agencies, other than corporate agencies, as he may deem necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate."

There are two conclusive answers to the claim that this Section authorized the transfer.

a. In the first place, delegation is permitted, "except as otherwise specifically provided." The Act does contain such a specific prohibition against delegation of Title IV functions. Section 403 (64 Stat. 807, 50 U.S.C. App. § 2103 (Supp. V 1952)) provides:

> "At such time as the President determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy, he shall administer such controls, and rationing . . . through a new independent agency created for such purpose . . ."[13]

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[13]As we have shown above (pp. 43-44), "enforcement" does not include the power to hear and decide violation cases. Compare, in this connection, Sections 2 and 3 of Executive Order 10494, quoted at p. 55, which distinguishes between "Administrative proceedings" and "Enforcement and investigation." If, on the other hand, "enforcement" were construed, as Appellants frequently interpret the term, to include the power to hold administrative violation hearings, then there is additional language in Section 403(a) negativing the power to transfer functions of the Economic Stabilization Agency. The concluding part of the Section reads:

> "Such agency may utilize the services, information, and facilities of other agencies and departments of the Government, but such agency shall not delegate enforcement of any of the controls to be administered by it under this section to any other agency or department."

Under the above provision, on September 9, 1950 by Executive Order No. 10161, 15 Fed. Reg. 6105, the President "hereby created a new and independent agency to be known as the Economic Stabilization Agency" to administer the Title IV controls. This then was the agency, and no other, which could administer wage stabilization under the Congressional mandate.

b. Secondly, and, we believe, conclusively, Section 703(a) only authorized the President to delegate "any power or authority conferred upon him by this Act." Yet, the power or authority to impose penalties administratively through hearings, for violation of stabilization (under the assumptions in this entire point II of our brief, in accordance with Appellants' contentions) rested upon Section 405(b). But when the President issued his transfer order on October 16, 1953 (Executive Order 10494), Section 405(b), Title IV, "and all authority conferred thereunder" had terminated, under the express provisions of Section 717(a), *supra*, page 49 (Aplts. Br. Apdx. p. 86). Hence, as of October 16, 1953, he had no "power or authority conferred upon him by this Act" relative to stabilization which could be transferred or delegated.

3. *The 1942 stabilization experience does not support the asserted transfer power.* With no language in the Act authorizing the transfer, Appellants again have attempted to rely upon a comparison with what was done under the 1942 stabilization legislation (Aplts. Br. pp. 72-73, 75). But the situations are not remotely comparable. Executive Order No. 9809 of December 12, 1946, 11 Fed. Reg. 1428 (Aplts. Br. p. 75), which transferred wage stabilization functions to the Treasury, was issued "by virtue of the authority" vested in the Presi-

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dent by "Title I of the First War Powers Act, 1941, Title III of the Second War Powers Act, 1942, . . . and section 2 of the Stabilization Act of 1942." In addition to the War Powers Acts, the Stabilization Act of 1942 was then still in effect (60 Stat. 664, 50 U.S.C. App. §966 (1946)), and Section 2 thereof authorized transfer and delegation of powers without limitation. Similarly, the Appellants mistakenly place reliance (Aplts. Br. pp. 67, 69, 77) on *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129 (1947), and *United States v. Allied Oil Corp.*, 341 U.S. 1, 71 S.Ct. 544 (1951). The former held that the transfer of functions from the Office of Price Administration to the Office of Temporary Controls was authorized by Section 1 of the First War Powers Act of 1941 (55 Stat. 838, 50 U.S.C. App. §601 (1946)), and the latter merely reaffirmed the former. In the instant situation there are no existing acts authorizing the transfer. The very fact that Congress provided in Section 717(b)(3) of the Defense Production Act of 1950 that the agency's functions could continue in liquidation for six months after the expiration of controls (another circumstance distinguishing the 1942 legislation) is a compelling indication that Congress expected this entire program to be wound up by the end of that six months period, and hence there would be no necessity for continuing the agency or transferring its functions. And there is nothing in the 1953 Senate Appropriation Committee Report (Aplts. Br. pp. 56, 74), which was issued prior to the October 31, 1953 final termination date and with Section 706(b)—providing for jurisdiction in the federal courts and the Attorney General—still in effect, suggesting that the members of that Committee had any different ideas.

C. No Savings Statute Authorizes Continuance of the Proceedings Enjoined.

It apparently is not disputed by the Appellants that in view of the termination of Title IV of the Act, any liability thereunder ceased, unless a "savings" clause continues the liability in effect. The Appellants argue that there is such a savings clause and that it not only preserves the remedy but the tribunal. We do not believe the pertinent statutes can be so construed.

1. *Savings clause of the Defense Production Act.* Section 706(b) of the Defense Production Act of 1950 (Aplts. Br. Apdx. pp. 84-85) does contain a savings clause. It provides, in this connection:

> "The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order . . ."

The above savings clause, however, does not preserve any liability in any administrative proceeding because its only effect is to permit any "suit, action, or prosecution." These terms do not extend to an administrative hearing, as distinguished from a judicial proceeding. "Suit" and "action" are customarily used to differentiate between an equity proceeding and one on the "law" side of a judicial controversy. *County of Upshur v. Rich*, 135 U.S. 467, 10 S.Ct. 651 (1894); *Weston v. City Council of Charleston*, 2 Peters 449 (U.S. 1829); *Cohens v. Virginia*, 6 Wheat. 264 (U.S. 1820). The term "prosecu-

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tion" obviously refers to a criminal proceeding by indictment or information. *United States v. Reisinger,* 128 U.S. 398, 9 S.Ct. 99, 101 (1888); *Tennessee v. Davis,* 10 Otto 257 (U.S. 1880). The distinction between such judicial proceedings and an administrative hearing was recently recognized by Executive Order 10434 of February 6, 1953, 18 Fed. Reg. 809, which suspended the wage stabilization program under Title IV of the Act. This order contained a savings clause of its own to the effect that the suspension would not operate to defeat any "suit, action, prosecution, or *administrative proceeding*" (emphasis added).

Appellants, who rely solely on the General Savings Statute (Aplts. Br. p. 67, point "A"),[14] concede the "omission" of Section 706(b) "to spell out coverage of the administrative enforcement procedure."[15] Any right,

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[14]The Appellants assert also, almost parenthetically, that Section 705(a), from which they quote, continues to authorize administrative violation proceedings (Aplts. Br. p. 76). But it never did, as we pointed out above, pp. 33-35. Appellants, italicizing the language, appear to deem it significant that the investigatory powers granted in that Section continue for two years after the Act ceases to be in effect. But this provision in this respect is merely a counterpart to the saving of judicial remedies by Section 706(b). Investigations in connection with criminal prosecutions or damage and other civil actions, which under Section 706(b) could be maintained after termination of the Act, would require the continuing investigatory power. Other reasons for the additional two-year investigation authority, unrelated to the maintenance of administrative hearings under Section 405(b), are readily apparent.

[15]Appellants assert (Aplts. Br. p. 73) that Section 706(b) "was taken from Section 1(b) of the 1942 price control legislation," without quoting in the body of their brief or the appendix the provisions of Section 1(b) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S.C. App. §§ 901 *et seq.* (1946)). Actually, there is no justification for this assertion by Appellants. The two sections are dissimilar in more respects than they are comparable.

then, which Appellants may have after termination of Title IV to continue administrative hearings under Section 405(b) must be found elsewhere.

2. *General Savings Statute.* Appellants do assert that the liability, remedy, and forum are maintained by the General Savings Statute (61 Stat. 635 (1947), 1 U.S.C. § 109 (Supp. V 1952); Aplts. Br. p. 67), and that (Aplts. Br. p. 66) that Statute applies "in the absence of an express provision in the temporary legislation to the contrary."[16] Both such propositions are untenable.

The General Savings Statute has no applicability herein whatsoever because, so far as liability under the Defense Production Act of 1950 is concerned, it is superseded by the specific savings provision in Section 706(b) of the later Act. As this Court observed in *Hertz v. Woodman*, 218 U.S. 205, 218, 30 S.Ct. 621, 625 (1910):

> "The repealing act here involved includes a savings clause, and if it necessarily, or by clear implication, conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail."

("Section 13" refers to the Revised Statutes from which the General Savings Statute was codified into 1 U.S.C. § 109 (Supp. V 1952)). To the same effect is *Great Northern Ry. v. United States*, 208 U.S. 452, 465, 28 S.Ct. 313, 316 (1907):

> "As the Section of the Revised Statutes in question has only the force of a statute, its provisions

[16]Appellants again mistakenly cite (Aplts. Br. p. 67) *United States v. Allied Oil Corp.*, 341 U.S. 1, 5, 71 S.Ct. 544 (1951), and *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129 (1947), relative to the alleged primary purpose of the General Savings Statute. Neither holds or has any language bearing on such purpose.

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> cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication, in a subsequent enactment."

Where, as here, in a temporary statute Congress specifically sets forth a saving clause covering in the main the same scope as the General Savings Statute, but with significant omissions therefrom, it must be held that the later specific clause supersedes the earlier, general statute. Otherwise, we must impute to Congress an intent to insert in Section 706(b) absolutely meaningless and useless language. Is there any doubt that if the savings language in Section 706(b) was broader than that in the General Savings Statute the former would control?

Further, not only is the liability in an administrative proceeding not preserved by the General Savings Statute, but in the instant case there is no remedy or tribunal preserved to try the question of liability. *Cf. Bruner v. United States,* 343 U.S. 112, 72 S.Ct. 581 (1952); *Hallowell v. Commons,* 239 U.S. 506, 36 S.Ct. 202 (1915); *Hertz v. Woodman,* 218 U.S. 205, 30 S.Ct. 621 (1910); *Great Northern Ry. v. United States,* 208 U.S. 452, 28 S.Ct. 313 (1907). In this connection, Appellants rely (Aplts. Br. p. 68) on the case of *De La Rama S.S. Co. v. United States,* 344 U.S. 386, 73 S.Ct. 381 (1953). But that decision is distinguishable on many grounds.

In the first place, the action was one to recover from the Government on a war risk policy issued by the War Shipping Administration. Due process required that the petitioner be sustained, for, as the Court observed (344 U.S. at 388, 73 S.Ct. at 382):

> "Apart from R.S. § 13, the Constitution precludes extinction of the Government's liability."

Secondly, that case did not involve, as here, the termination of a statute which had its own savings clause. And in this connection it is significant that the specific savings clause of Section 706(b) does not contain the language of the General Savings Statute that "such statute shall be treated as still remaining in force for the purpose of sustaining any proper action," etc.

Thirdly, it was not held that the General Savings Statute authorized the continuance of a temporary tribunal or the transfer of jurisdiction from one tribunal to another. The repealed statute had placed jurisdiction in the U. S. District Courts which, of course, were continuing to function.[17] We think the fallacy of Appellants' view is here made obvious. If, as we contend, the Court finds that the administration of Title IV by the Economic Stabilization Agency could not be delegated or transferred, how would the continuance of the agency be financed after the expiration of the period for termination of the agency under Section 717(b)(3)? This Court has never held that the General Savings Statute authorizes either the continuance in effect of an agency or tribunal beyond the period specifically prescribed by Congress, or the transfer of the functions to another agency.

Finally, some months after the decision in *De La Rama S.S. Co.* this Court declared in *Bridges v. United States*, 346 U.S. 209, 227, n. 25, 73 S.Ct. 1055, 1065 (1953), that, "the general saving clause that was in the Revised Statutes . . . has been regarded as not applicable to matters of remedy and procedure."

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[17]It is also true that in the National Labor Relations Act cases relied on (Aplts. Br. p. 68), the tribunal—the National Labor Relations Board—was continuing in existence, and not by virtue of the General Savings Statute.

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In concluding this discussion, we submit that there are many provisions in the Defense Production Act of 1950 requiring a finding that Congress intended a prompt winding up of stabilization with the termination of the agency and proceedings, saving only those liabilities and remedies prescribed by Section 706(b). In addition to the general discussion earlier as to Congress' impatience with stabilization, the following are here particularly significant: (a) The insistence in Section 403(a) that stabilization be administered by a new and independent agency; (b) The specific requirement by Section 717 (b)(3) that the agency liquidate within six months after termination of Title IV; (c) The absence of any provision relative to transfer of functions after such termination; (d) The savings clause in Section 706(b); (e) And finally, the fact that Congress made specific provision for certain problems arising upon the termination of the agency. Thus, Section 717(c) provides in part:

> "The termination of any section of this Act, or of any agency or corporation utilized under this Act, shall not affect . . . the taking of any action necessary to preserve or protect the interest of the United States in any amounts advanced or paid out in carrying on operations under this Act."

Congress, therefore, gave consideration to the problems involved upon termination of the Act and its adoption of language in Section 706(b) more restrictive than that in

the General Savings Statute must be held to reflect an intent to supersede the latter statute.[18]

The foregoing provisions all indicate a consistent pattern, with the intention of a rapid wind-up of any administrative proceedings and agencies authorized, not later than October 31, 1953. The General Savings Statute is inapplicable, the provisions covering preservation of liabilities being contained in Section 706(b). Since that Section does not save liabilities enforceable only in an administrative proceeding, and since, in any event, no authority existed to "transfer" the stabilization functions to the Office of Defense Mobilization, there does not now exist any lawful administrative agency with power to try Appellee. Consequently, the injunction granted by the trial court should be sustained even though it should be held that Section 405(b), while it was in effect, authorized administrative adjudication of violations.

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[18]With reference to the Appellants' overworked argument (Aplts. Br. pp. 69, 71-73, 75) as to the significance of the 1942 wage legislation and what the Government did thereunder (as distinguished from what may have been lawful), the short and simple answer is, as Appellants concede (Aplts. Br. p. 72), that the Stabilization Act of 1942 did not contain any specific savings clause, nor did it have a six months agency liquidation provision, and so on. Hence the General Savings Statute was applicable.

Of even less value is the reference (Aplts. Br. p. 76) to Mr. Fleming's comment to the Senate Appropriations Committee about the necessity upon termination of shifting his agency's functions to some other agency. Senator Ellender immediately rejoined, "Would Justice have the right to take it over without any further appropriation or change in the law?" *Hearings before Senate Committee on Appropriations on Supplemental Appropriation Bill, H.R. 6200,* 83d Cong., 1st Sess. 431 (1953).

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III.

The Regulations and Orders Under Which the Agency Purports to Proceed Against Appellee Are in Direct Conflict With Various Provisions of the Act.

In addition to the National Enforcement Commission's usurpation of the power of the district courts, and to the unauthorized continuance of administrative disallowance proceedings after expiration of Title IV, there are other flagrant inconsistencies between the regulations and the Act which render the threatened administrative action a nullity.

A. The Regulations Establishing Disallowance Procedures Are Invalid Under Section 709 Because of the Absence of a Statement of Considerations.

Congress was concerned that those affected by the Act be consulted with respect to regulations promulgated under the Act. This concern was expressed at least twice in the Act. Yet so positive a mandate as this was ignored in the promulgation of several of the most important Economic Stabilization Agency regulations.

Section 404 (64 Stat. 807, 50 U.S.C. App. § 2104 (Supp. V 1952)) provides:

> "In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder."

Implementing this provision, section 709 (64 Stat. 819, 50 U.S.C. App. § 2159 (Supp. V 1952)) provides:

> "The functions exercised under this Act shall be excluded from the operation of the Administrative Pro-

cedure Act (60 Stat. 237) except as to the requirements of section 3 thereof. Any rule, regulation or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate."

The requirement of Section 709 was ignored by the Economic Stabilization Administrator in the promulgation of the very regulations under which Appellants claim authority to act. Thus General Order 15, prescribing standards for disallowance, completely omits any such statement, both in its original form (17 Fed. Reg. 2994) and as amended (17 Fed. Reg. 9977). General Order 18, establishing the National Enforcement Commission, similarly omits any such statement (17 Fed. Reg. 6925, 9977). In General Procedural Regulation 1, Revised, establishing the procedure to be followed before the National Enforcement Commission, there is perhaps a recognition that a statement of considerations was required in the recital that:

> "In the formulation of this regulation, due consideration has been given to the standards and procedures set forth in Titles IV and VII of the Defense Production Act of 1950, as amended, hereinafter referred to as the Act." 17 Fed. Reg. 7737, 7738.

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But this is not, of course, compliance with the requirement of Section 709. Finally, General Administrative Order I-2 (18 Fed. Reg. 6966, Oct. 26, 1953) issued by the Director of the Office of Defense Mobilization, adopting the three regulations already referred to for the purpose of continuing administrative enforcement proceedings under Executive Order 10494 (18 Fed. Reg. 6585), contains no such statement.

It is submitted that the failure to include a statement of considerations in any of the above regulations causes them to be invalid. It is clearly implied, by the provision that an *inaccurate* statement should not be held "invalid," that the complete absence of any statement does render a regulation "invalid." And the importance which Congress attached to such consultation—shown by the fact that two separate sections are concerned with consultation and by the use in both instances of the mandatory "shall" —justifies holding these regulations invalid.

The fact that consultation could be avoided if it were impracticable and the agency so stated, does not mean that no attention needed to be given to the requirement. The provision that a statement could not be held invalid if found to be inaccurate was only intended to prevent collateral inquiries; Congress could assume that a statement was true since consultation could be avoided upon the agency's finding that it was impracticable and so stating.

That the section applies to the regulations in question is clear since it applied to "any rule, regulation or order, or amendment thereto, issued under authority of this Act." Indeed, its application to procedural regulations is made particularly clear by the first sentence of the sec-

tion, which specifically adopts the requirements of the Administrative Procedure Act relative to publication of procedural regulations.

B. The Collapse of the Tri-Partite Wage Stabilization Board Destroyed the Section 403(b) Scheme for Administration of Wage Controls.

When Congress in 1952 reconstituted the Wage Stabilization Board and made it a statutory agency (Section 403(b), 66 Stat. 300, 50 U.S.C. App. § 2103(b) (Supp. 1953)), it conferred upon the Board new functions which were intended to have substantial effect on administration of the wage stabilization program. Those functions pertinent to the present case were set out as follows in subsection 403(b)(5):

> "(5) The Board shall, under the supervision and direction of the Economic Stabilization Administrator—
>
> (A) formulate, and recommend to such Administrator for promulgation, general policies and general regulations relating to the stabilization of wages, salaries, and other compensation; and
>
> (B) upon the request of (i) any person substantially affected thereby, or (ii) any Federal department or agency whose functions, as provided by law, may be affected thereby or may have an effect thereon, advise as to the interpretation, or the application to particular circumstances, of policies and regulations promulgated by such Administrator which relate to the stabilization of wages, salaries and other compensation."

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Thus, this Section vested primary responsibility for formulation of regulations and for interpretation of their application to specific cases, in the new tri-partite Board. The clause quoted was taken from the Senate bill, and the Senate Committee said of it:

> "This authorizes the Board, under the supervision and direction of the Administrator, to issue rulings and decisions in particular cases arising under wage stabilization." Sen. Rep. No. 1599, 82d Cong., 2d Sess. 28 (1952).

The tri-partite character of the Board was the subject of vigorous dispute in Congress. See H.R. Rep. 2352, 82d Cong., 2d Sess. 23 (1952). This choice of composition reflected a Congressional belief that the interests of labor and industry would best be protected thereby.

Both the creation of a Board of tri-partite character, and the delegation to it of powers to "issue rulings and decisions in particular cases," call attention to Congress' intention that *all aspects* of wage regulation be supervised by a Board on which the interests of each group affected were represented. Indeed, the cited powers of the new Board would have entitled Appellee to obtain an interpretation from the Board with respect to the legality of Appellee's wage increases, which interpretation, if favorable, would have carried great weight in any court proceeding, or, if the administrative enforcement procedure were valid would have been binding upon the National Enforcement Commission. Accordingly, it is clear that the availability of a Board ruling was, and was

intended to be, an integral part of a defense to a prosecution or other action for violation of wage regulations.

However, on December 6, 1952, the industry members of the Board resigned and were never replaced [R. 21]. Thus, almost within a month of the filing of the complaint against Appellee, and prior to the National Enforcement Commission's order amending said complaint, in response to Appellee's motion for a more definite statement [R. 3-4, 22], the new statutory route through which Appellee might have obtained relief was closed.

Substituted in place of the statutory Board was a "Wage Stabilization Committee," which was composed of the public members of the collapsed Board (General Order 19, 17 Fed. Reg. 11368). This Committee could not, of course, exercise the powers specifically delegated by statute to the tri-partite Board. Yet there was no attempt to fill the vacancies on the Board, although its term of office extended under statute to May 1, 1953, the date at which all Title IV powers expired. In place of the procedures established by Congress, procedures were substituted which were in direct conflict with the carefully considered Congressional mandate. And as a result Appellee's real administrative remedies disappeared. Without their restoration, all basis for Appellants' asserted power to take any action against Appellee was destroyed.

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C. In Authorizing Penalties Over and Above That Part of a Wage Payment Determined to Be Illegal, the Regulations Contravened Section 405(b).

Section 405(b) provides only for the disallowance of any wage, salary or compensation "payment made in contravention" of the regulations. Now, if employer and employee agreed that a salary increase should take the form of a cost-of-living bonus and if the bonus were illegal, it could not be contended that the continued payment of the basic salary (as distinguished from the bonus) suddenly became a "payment in contravention." Clearly the only "payment in contravention" would be the actual payment of the cost-of-living bonus itself. And there can logically be no distinction if the salary itself were illegally increased to provide additional compensation in the same amount. Only the amount of the increase would constitute a "payment in contravention."

However, Section 4(b) of General Order 15 (17 Fed. Reg. 2994, 9977) provides that the "entire amount" of the wage or salary paid, "not merely the amount paid in excess of the legal maximum of such wage (or) salary," shall be disallowed unless certain mitigating circumstances exist. This is not what Congress intended.[18a] The standard adopted, disallowance of the entire amount, bears no relation to the damage resulting from a violation. Thus,

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[18a]The contrary point of view expressed in *Woodworth v. Kavanagh*, 102 F. Supp. 9 (E.D. Mich. 1952), *aff'd per cur.* 202 F.2d 154 (6th Cir., 1953), under Section 5(a) of the Stabilization Act of 1942, in a ruling upon the government's motion to dismiss is simply not convincing. See pp. 103-104, *infra*.

as construed by the Economic Stabilization Administrator, the disallowance sanction becomes highly penal. Furthermore, disallowance of the entire amount effects utterly arbitrary discrimination among employers. The illegal raise of a highly paid employee's salary to the extent of a few cents, draws a more drastic sanction than the doubling of a low wage, and as the bonus illustration above shows, the regulation makes the amount of the penalty depend upon the form selected for the increase and not its substance. This administrative construction should be rejected, if for no other reason, in order to avoid the very real constitutional difficulties which the above discussion suggests, and which are more fully discussed below.

D. In Authorizing the Retroactive Imposition of Penalties, the Regulations Also Were Invalid.

Wages were first stabilized on January 26, 1951, when General Wage Regulation 1 was issued (16 Fed. Reg. 816). At such time, while the statute directed the President to prescribe the extent to which wage payments made in violation of regulation should be disregarded for certain purposes, no such regulation had been issued.

Disallowance was obviously not intended to be made available as a sanction until the powers delegated by the Section were exercised, for the regulation contemplated was substantive. Classifications were required: "the extent to which" the excess paid in violation was to be disallowed might depend upon the wilfulness of the violation

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and this remained to be defined; the circumstances under which the disallowance would be made for tax purposes, for government contract purposes, or for other purposes, remained to be described. Until such a regulation was issued, no one could have any idea of the magnitude of the penalty which might be incurred by a violation.

No such regulation was issued for almost five months after the wage freeze. The first approach toward definition of the specific penalties applicable under Section 405(b) was the Wage Stabilization Board's Enforcement Resolution issued in June of 1951 (16 Fed. Reg. 6028). The resolution was apparently not intended to operate retroactively; however, General Order 15 as amended (17 Fed. Reg. 2994, 9977), which amplifies the provisions of the Enforcement Resolution and other regulations issued subsequently thereto, and which is the last regulation defining the standards for disallowance, requires retroactive application. Section 3 of this Order provides that the National Enforcement Commission has authority "to determine whether any wage, salary or other compensation has been paid or accrued, *at any time,* in violation of any provision of the Defense Production Act of 1950, as amended, or any regulation or order or directive heretofore or hereafter promulgated under the Act, . . . and further to determine the amount of payments or accruals to be disregarded and disallowed" (17 Fed. Reg. 9977, emphasis added).

Since Appellee's alleged violations of the regulations began January 26, 1951 [R. 10], and for the most part were challenged only up to April 1, 1951 [R. 46-48, 61, 77-78], the Appellants' attempted application of Section 405(b) was clearly retroactive as to Appellee. Yet there is nothing in that Section which permits retroactive application of the penalties authorized, and in the absence of an unequivocal legislative expression that retroactive operation was intended, a statute will not be construed to authorize regulations with retroactive effect. *Miller v. United States,* 294 U.S. 435, 439, 55 S.Ct. 440, 442 (1935). That rule is particularly applicable here, since serious constitutional questions are raised in the case of a retroactive penalty. *Cf. Untermyer v. Anderson,* 276 U.S. 440, 48 S.Ct. 353 (1928) holding a retroactive gift tax unconstitutional; a retroactive penalty of course presents an even stronger case. Considering the interpretation placed upon 405(b) by these regulations, which required disallowance not only of the excess but of the entire amount of the wage, we have retroactivity with a vengeance.

Most of Appellee's allegedly violative wage payments cannot be disallowed except by retroactive interpretation of General Order 15, and Appellee faces a withdrawal of credit, and irreparable injury, if an Enforcement Commissioner finds on the basis of General Order 15 that such wages should be disallowed. Thus, the invalid retroactive application of the Order is a particularly strong ground on which to base affirmance of the decision below.

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IV.

Title IV of the Defense Production Act of 1950 Is Unconstitutional.

While the District Court properly avoided [R. 35] the constitutional issues raised by the complaint [R. 6, 7], we respectfully urge these issues before this Court as constituting additional support for the judgment below and as proper issues to be determined by this Court in the event it fails to affirm said lower court's decision upon one or more of the grounds hereinabove set forth. These constitutional issues are definitely presented for decision if Appellants' construction of the Act is accepted.

We have discussed the matters raised in Points I and II quite fully in this brief because we believe that each Point alone requires an affirmance of the lower court's decision. But because of the limitations of time, the already great length of this brief and the basis of the District Court's decision, we have dealt with the following constitutional issues in a rather summary fashion. This should not be taken as an indication that Appellee believes that any one of the objections is lacking in merit. While recognizing that these issues are of varying merit and that probably neither this Court nor any single judge would agree with Appellee on all of the constitutional objections presented, we submit that this Court should find with Appellee on one or more of the issues that follow.

A. The Act Is Invalid Under the Fifth Amendment in Depriving Appellee of Its Property Without Due Process of Law.

Preliminarily to discussing some of the specific respects in which the Act is in conflict with the United States Constitution the Court's attention is called to the penalty allegedly permitted thereunder. Under standards contained in General Order No. 15 (17 Fed. Reg. 2994, 9977) issued by the Economic Stabilization Administrator, it is asserted by the Appellants that the total illegal wage paid by Appellee was $5,561,484.11 [R. 46-48, 61, 77-78]. This means that if Appellants establish their case of claimed illegality, the potential penalty confronting Appellee is a federal income tax deficiency of $3,750,046.60 [R. 57, 59; Pltf. Exs. H and J] or the denial of Government contract reimbursements[19] in the amount of $5,561,484.11! The authorization by, or allowance of any such penalty under the Act is, we submit, contrary to the Constitution.

1. *Lack of judicial review.* No provision is made in the Defense Production Act of 1950 for judicial determination of the validity of wage and salary regulations other than in a suit to determine violations under Section 706(b) (64 Stat. 817, 50 U.S.C. App. (Supp. V) § 2156(b)), although there is detailed provision in Sections 407 and 408 (64 Stat. 807, 808, 50 U.S.C. App.

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[19]While Appellee realizes that in the actual practice, the purported administrative penalty has been limited to a disallowance of wages for income tax purposes (Aplt's. Br., pp. 6-7), the Appellants have never conceded that they would be so limited in any penalty they might desire to impose upon Appellee. On the contrary, their administrative complaint [R. 8-10] contains the opposite inference.

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(Supp. V) §§ 2107, 2108) for such review of price regulations. This lack of provision for review in the statute itself, taken in conjunction with the Congressional history explaining the reason for such absence (96 Cong. Rec. 12133, 12480, 14072-14073), shows persuasively that Congress intended that such regulations not be subject to prior review. However practical the reason for this withdrawal of review, it clearly contravenes the due process clause of the Fifth Amendment. *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492 (1922); see *Estep v. United States*, 327 U.S. 114, 120, 66 S.Ct. 423, 426 (1945).

The Defense Production Act of 1950 requires a person to submit to all regulations, valid and invalid alike, upon the threat of a heavy penalty. A requirement such as this has been condemned by this Court in prior cases of unimpaired authority such as *Southwestern Telephone & Telegraph Co. v. Danaher*, 238 U.S. 482, 490, 35 S.Ct. 886, 888 (1914), "There was no mode of judicially testing the regulation's reasonableness in advance of acting under it . . . In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law": and *Wadley Southern R. Co. v. Georgia*, 235 U.S. 651, 662, 35 S.Ct. 214, 218 (1914), ". . . A statute, therefore, which imposes heavy penalties for violations of commands of an unascertained quality is, in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position

where he himself must, at his own risk, pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

But Appellants apparently claim that some type of judicial review of any administrative enforcement proceeding can be obtained at a later time (Aplts. Br. pp. 38-41). However, under their theory of a right to administratively determine violations the Defense Production Act of 1950 makes no provision for such review and the Economic Stabilization Administrator has asserted by regulations that any such administrative determination is final and not subject to review. This assertion is made in Section 6 of General Order No. 15 (Aplts. Br. Apdx. pp. 89-93) which states in part:

> ". . . Any determination made . . . shall be final and not subject to review by the Tax Court of the United States or by any court in any civil proceeding";

and in General Procedural Regulation No. 1, Revised, (Sections 5.2(c), 6.1, Aplts. Br. Apdx. p. 103) in which it is provided that:

> "the findings and determination of the National Enforcement Commission shall be final";

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and that:

> "The certificate of disallowance shall be conclusive for the purposes stated therein."

Appellants fail to negate the above quoted language of General Order No. 15 (Aplts. Br. p. 40) or deny that a motion to dismiss based on this Order would be filed in any such subsequent judicial proceeding.[20] In connection with the latter point, it should be observed that in the one instance where district court review was sought of disallowance penalties administratively imposed for wage violations during World War II, the petitioner was met by a government motion to dismiss, which sought to preclude review of the merits of the administrative action.[21]

This case illustrates the hollowness of the argument that Appellee should be willing to risk an administrative finding of violation and the consequent issuance of a certificate of tax disallowance, to pay the tax, and to bring suit for refund in the district court—even assuming Appellee could afford to pay the tax deficiency so assessed.

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[20]It should be noted that General Order No. 15 (17 Fed. Reg. 2994, 9977) has remained the same throughout this present litigation even though the same argument as to subsequent judicial review was urged upon the lower court during the hearing on the preliminary injunction. As a matter of fact, this Order was recently reaffirmed by Appellants. (General Administrative Order I-2, effective Nov. 1, 1953, 18 Fed. Reg. 6966).

[21]See *N. A. Woodworth Co. v. Kavanagh*, 102 F. Supp. 9 (Mich., 1952), *aff'd without opinion*, 202 F.2d 154 (6th Cir. 1953), a case involving the Stabilization Act of 1942 (56 Stat. 765, 50 U.S.C. App. §§ 961 *et seq.*), where the motion to dismiss was made upon the ground that by regulation "it was specifically provided that any determination of said National War Labor Board shall be final and shall not be subject to review by any court in any civil proceeding."

which the evidence clearly indicates it could not [R. 48-60, 54, 57, 58, 79; Pltf. Exs. G, H, I and J]. Nor is the suggestion (Aplts. Br. pp. 38-39) that Appellee could attack any deficiency in the Tax Court more helpful. Not only is the Tax Court itself an administrative tribunal where Appellee could not assert its right to a jury trial (see paragraph B, *infra,* pp. 84-86), but in view of what Appellee's financial condition would be upon issuance of a disallowance certificate [R. 37, 51-64], the obvious step to be taken immediately by the Commissioner of Internal Revenue would be the levy of a jeopardy assessment and the filing of a lien which would effectively destroy what might then be left of Appellee's ability to carry on its business. Finally, in the event of an adverse decision by the Tax Court, before plaintiff could obtain judicial review—and thus have its first day in a judicial forum under the course of procedure suggested by Appellants—it would be required to file a bond of up to twice the amount of the deficiency. Appellee might well find it impossible to meet this condition, in view of the above. No wonder Appellants would prefer that any judicial review of their illegal action be "postponed."

We therefore submit that the Defense Production Act of 1950 in denying judicial review of any wage regulation prior to a suit alleging a violation thereof, and the administrative action (General Order No. 15, 17 Fed. Reg. 2994, 9977; General Procedural Regulation 1, Revised, 17 Fed. Reg. 7737) purporting to prevent any challenge of the wage regulations even after an administrative determination of violation (assuming such a procedure is permissible) deprive Appellee of due process of law.

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2. *Other objections under the Fifth Amendment.* The regulations of the Economic Stabilization Administrator interpret the Act as authorizing disallowance of the entire amount of wage paid in violation of regulation, not only of the illegal excess (General Order 15, 17 Fed. Reg. 2994, 9977). While we submit that this construction is untenable, if the Act does authorize disallowance of the entire amount then it is clear that the penalty bears no relation either to the damage to the public interest or to the extent of the violation or to any other standard. In some cases, the amount of excess might have been very small and the remaining wage very large, while in others the amount of excess itself might have been very large. For example, the penalty would be the same where one employer unlawfully increases his wage rates by one cent an hour and another unlawfully increases his rates twenty-five cents an hour, if the total wages are the same. Thus, there is no statutory differentiation between the minor violation and the major violation and the lack thereof renders the penalty arbitrary and oppressive and constitutes a taking of property without due process of law. See *Missouri Pacific Railway Co. v. Tucker,* 230 U.S. 340, 351, 33 S.Ct. 961, 964 (1912), where a carrier collected a tariff of $3.02 in excess of the allowable and the statute provided for a liability for such overcharge in the amount of $500, the court, in holding the statute unconstitutional, declared:

> "As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law and therefore in contravention of the Fourteenth Amendment."

Furthermore, application of the penalty of tax disallowance denies due process and equal protection of the law to the extent that different monetary penalties result solely because of the tax bracket of the particular employer-taxpayer and without relation to the degree of the violation.[22] Nor, it is significant to note, do the regulations governing the disallowance standards to be followed make any express provision for mitigating the effect of these inequalities, although providing for other mitigating circumstances (General Order 15, Aplts. Br. Apdx. pp. 89-93).

B. The Act Is Invalid Under the Sixth or Seventh Amendments in Depriving Appellee of the Right to a Jury Trial.

The disallowance provision of the statute, at least to the extent that the entire amount of a wage can be disallowed, clearly imposes a penalty[23] and in an action on a statutory penalty, analogous to the common law action of debt, the constitutional right to a jury trial must be recognized. *Leimer v. Woods,* 196 F.2d 828, 834 (8th Cir. 1952); *People ex rel. Lemon v. Elnore,* 256 N.Y.

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[22]To illustrate: if identical disallowances of wages, in the amount of $100,000 were imposed on two corporate employers with identical wage situations except that one had a $100,000 income tax loss in the year of violation and the other for such year was subject to the excess profits tax, the former would suffer no penalty while the latter could be penalized $82,000 plus interest!

[23]*Cf. Bowles v. Farmers National Bank of Lebanon,* 147 F.2d 425, 428-429 (CCA 6th, 1945) ("Moreover, if the sum of money is to be recovered by a third person for violation of a statute instead of the person injured . . . or if the sum exacted is greatly disproportionate to the actual loss . . . it constitutes a penalty rather than damages. The fact that the sum is to be recovered in a civil action does not determine the nature of the action.").

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489, 177 N.E. 14 (1931). And see *United States v.* Regan, 232 U.S. 37, 47, 34 S.Ct. 213, 216-217 (1913), where the Government brought an action of debt to recover a statutory penalty under the Alien Immigration Act (34 Stat. at L. 898, Chap. 1134). The Court stated:

> "While the defendant was entitled to have the issue tried before a jury, this right did not arise from article 3 of the Constitution or from the 6th Amendment, for both relate to prosecutions which are strictly criminal in their nature (citations), but it did arise out of the fact that in a civil action of debt involving more than $20 a jury trial is demandable."

Yet no jury trial is available in administrative disallowance proceedings which Appellants claim are authorized by the Act. While it may be asserted that the imposition of penalties for wage violation is not a proceeding known to the common law, this fact does not furnish the premise for an argument that the right to a jury trial need not be afforded, for it proves too much. If it were a complete answer to say that any administrative proceeding is an action unknown to the common law, then Congress could, by statutory enactment, destroy the right of trial by jury. By such specious reasoning the effectiveness of the Seventh Amendment would be completely nullified. *See United States v. Jepson,* 90 F. Supp. 983, 986 (N.J. 1950) (". . . To hold otherwise would be to open the way for Congress to nullify the constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights.")

Cases such as *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615

(1937), and *Helvering v. Mitchell,* 303 U.S. 391, 58 S.Ct. 630 (1938), involved merely remedial sanctions and hence are distinguishable.

Finally, it should be noted that there are numerous instances of the right to a jury being guaranteed in a statute providing for the imposition of penalties in the event of violation. For example, the treble damages provision in the Sherman Act (38 Stat. 731 (1890), 15 U.S.C. § 15 (1946)) provides for suit in the district court and, of course, the parties have the right to a jury trial. *Meeker v. Lehigh Valley R.R.,* 162 Fed. 354 (2d Cir. 1908).

C. The Act Is Invalid Under the Eighth Amendment in Authorizing Excessive Fines.

The prescribed maximum fine for a willful violation of wage stabilization regulations is $10,000, Section 409(b), (64 Stat. 811, 50 U.S.C. (Supp. V) § 2109(b)); *cf. United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 73 S.Ct. 227 (1952). Yet the actual penalty sought to be imposed by Appellants for an alleged unintentional violation amounts to several million dollars [R. 48, 58, 77; Pltf. Ex. J]. The punishment would clearly be disproportionate to the offense; *cf. Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544 (1910); and constitutes an excessive fine in violation of the Eighth Amendment.

In *N. A. Woodworth Co. v. Kavanagh,* 102 F. Supp. 9 (E.D. Mich., 1952), *aff'd without opinion,* 202 F.2d 154

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(6th Cir. 1953), the lower court held that Section 5(a) of the Economic Stabilization Act of 1942 (56 Stat. 767, 50 U.S.C. App. § 965 (1946)), containing language similar to Section 405(b) of the Defense Production Act of 1950, did not violate the Eighth Amendment. However, the only argument presented to the judge was on the question raised by the Government's motion to dismiss on the ground that under the Executive orders judicial review was not permitted. This decision was affirmed without opinion by the Sixth Circuit Court of Appeals. However, it is not known whether the Court ruled on this issue—the Government claimed on appeal that the appellant had not properly raised and preserved its constitutional and statutory objections.

D. The Act Is Invalid Under Article I, Section 9, Clause 4 in Authorizing an Unapportioned Direct Tax.

The disallowance of wage payments for tax purposes results in the imposition of a tax on gross receipts which is not apportioned. Under Article I, Section 9, Clause 4 of the Constitution, a tax on gross receipts is unconstitutional unless apportioned. *Pollack v. Farmers Loan and Trust Co.*, 157 U.S. 429, 15 S.Ct. 673 (1895). By the statutory device of disallowance, the right to include wages as part of the cost of goods or services sold for income tax purposes is impaired. Since Appellee is engaged in selling the services of its employees such a disallowance would result in an imposition of a gross receipts tax on Appellee. This is not permitted by the Sixteenth Amendment because thereunder the cost of

goods or services sold, representing gross receipts, is not income in the constitutional sense. *Cf. Doyle v. Mitchell Bros.,* 247 U.S. 179, 38 S.Ct. 467 (1918); *Lela Sullenger,* 11 T.C. 1076 (1948). *But cf. Weather-Seal Mfg. Co. v. Commissioner,* 16 T.C. 1312, *aff'd mem.,* 199 F.2d 376 (6th Cir., 1952). See also *Commissioner v. Weisman,* 197 F.2d 221 (1st Cir., 1952), a case involving price disallowance, where the court carefully avoided the constitutional issue but nevertheless noted (p. 224, n. 1) that under Section 405(a) of the Defense Production Act of 1950, which is identical in effect with Section 405(b):

> "It is possible . . . that in effect the tax levied would amount to a gross receipts tax."

E. The Act Is Invalid Under Article I, Section 1 Because of the Improper Delegation of Legislative Power to the Executive.

Title IV of the Defense Production Act of 1950 (64 Stat. 803, 50 U.S.C. App. (Supp. V) §§ 2101 *et. seq.*) purportedly gave unlimited powers to the President relative to the imposition of wage controls, exceptions thereto, and the penalties for violation, without any real guides or standards to control him. While we believe that in all these respects the delegation is improper, that is particularly true with respect to Section 405(b) of the Act delegating to him the power to set forth the penalties for violations.

The President's delegated power under Section 405(b) is neither limited nor defined, even in general terms, nor is there even a suggestion that he should give consideration to any factors in arriving at a standard for any dis-

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allowance.[24] Under this authority presumably the Executive could make the standard of disallowance depend upon the size of the violator, the number of employees granted illegal increases (as contrasted to amount of the illegal payment), the location of the employer, the occupation of the employee, the industry of the employer, the income tax rate of the employer, the method of compensation, or any other standard which might strike his fancy.

It clearly appears that in granting the President this broad, sweeping, unqualified and unascertainable authority to fix the standards for disallowance of illegal wage payments Congress delegated its legislative power to the President in violation of Section 1 of Article I of the Constitution. *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241 (1935).

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[24]A fact which clearly distinguishes cases validating a statutory grant of authority to the Executive which contained such general limitations or directions. See for example, *Yakus v. United States*, 321 U.S. 414, 427, 64 S.Ct. 660, 668 (1944) (". . . prices fixed shall be fair and equitable and that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period . . ."); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397, 60 S.Ct. 907, 914 (1940) (". . . the Commission may fix maximum prices when in the public interest it deems it necessary in order to protect the consumer against unreasonably high prices.")

F. The Act Is Invalid Under the Tenth Amendment in Attempting to Legislate on Matters Thereby Reserved to the States.

The power, if any, to impose maximum wage controls rests with the States under the Tenth Amendment. We are not here challenging the power of Congress to enact legislation pursuant to specific grants of powers given it under the Constitution[25] but in purporting to authorize wage controls in the Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App. (Supp. V) §§ 2061 *et seq.*), Congress was not acting under any such prescribed powers. In this respect the Defense Production Act of 1950 differed from the Economic Stabilization Act of 1942 (56 Stat. 765, 50 U.S.C. App. §§ 961 *et seq.* (1946)) which was enacted during World War II. As of 1950, the cessation of the war with Japan, Congress has not declared war under its exclusive power granted by Article I, Section 8 of the Constitution. Therefore, we submit that neither the war power nor any other grant of specific constitutional power can be shown as authority for authorization of wage controls under the Defense Production Act of 1950.

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[25]See *e.g., United States v. Darby*, 312 U.S. 657, 61 S.Ct. 451 (1941) (power to regulate interstate commerce); *Dooley v. United States*, 183 U.S. 154, 22 S.Ct. 62 (1901) (power to lay duties and imposts); *Cf. West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578 (1937) (state police power).

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V.

The District Court Had Power and Jurisdiction to Grant, and Properly Issued, the Injunction.

A. The Facts Proved at the Trial Support the District Court's Finding That Appellee Would Suffer Irreparable Injury of the Kind Sufficient to Justify Enjoining the Holding of the Administrative Hearing.

The claim of Appellants that Appellee failed to "prove the 'kind of injury' which is sufficient to make the doctrine of exhaustion of administrative remedies inapplicable" (Aplts. Br. p. 17), properly recognizes that the exhaustion principle applies, under any circumstances, only where there is an absence of "irreparable injury."

We start with the facts showing such injury. The three-judge district court found "that the continuance of the threatened administrative proceeding *will cause plaintiff's bank credit to be shut off* and *will disable plaintiff from continuing its operations*" [R. 37, emphasis added]. It also found that Appellee would be irreparably damaged for the following additional reasons, set forth in paragraph XV of the complaint [R. 26-28: the complaint had been amended pursuant to stipulation of counsel and approval of the court, R. 24, 30]:

(1) In order to prevent its bank credit from being shut off, Appellee would have to pay any income tax assessed as the result of a certification of disallowance, without prior challenge.

(2) The witnesses required to testify at an administrative hearing would be top executives whose absence from Appellee's plant in another state would substantially impair Appellee's ability to perform contracts with the U. S. Air Force.

(3) The overhanging threat of disallowance would prevent Appellee from entering into contracts and conducting and expanding its business in normal fashion.

(4) Preparation for and participation in the administrative hearing would cause substantial expense, in excess of $10.000.

Appellants' sole attack upon the evidentiary basis of these findings by the district court is made in a footnote (Aplts. Br. p. 35, n. 21). Here, it is suggested that allegations with respect to impairment of credit are difficult to answer, and that evidence in support thereof is difficult to refute. Are the studiously generalized observations in this footnote offered as a substitute for the absence of any facts weakening in any respect the evidence upon which the three judges below based their findings? Certainly it is novel doctrine that evidence of irreparable damage should not be given the usual weight because opposing counsel would find such evidence hard to rebut. At any rate, this is the extent of Appellants' attack upon the facts found by the district court.

Appellants do, however, argue that such facts do not, as a matter of law, support the conclusion that sufficient irreparable injury was shown to warrant an injunction (Aplts. Br. pp. 32-38). It is the substance of this argument that no amount of damage from an allegedly invalid administrative proceeding can justify prior resort to the courts. But the cases cited do not go so far; they merely show that the Court will examine carefully *allegations* of irreparable injury, which are frequently all that is before it, in order to determine whether specific harm is actually threatened.

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Thus in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 67 S.Ct. 1493 (1947), no irreparable injury was shown by general allegations (quoted in Aptls. Br. at p. 37) that the appellant would be caused to run the risk of impaired credit or insolvency of its customers, "without specific allegation that any of them is seriously so threatened or facts to support such a claim" (331 U.S. at 778, 67 S.Ct. at 1506). In *United States v. Los Angeles & Salt Lake R. R.*, 273 U.S. 299, 47 S.Ct. 413 (1927), equitable jurisdiction could not be sustained upon the basis of general allegations to the effect that the carrier's credit with the public would be affected; it is notable that Appellants' detailed study of the record itself in that case (Aplts. Br. p. 36) disclosed only that these allegations respecting injury were no more detailed than reported by the Court in its opinion. In *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 273, 73 S.Ct. 236 (1953) the trial court's judgment denying an injunction was affirmed because of the complete lack of any evidence as to threatened or probable acts of the defendants which might cause irreparable injury. In contrast to these cases, we point to the facts found by the district court below and discussed in its opinion as follows [R. 35]:

> "The evidence further showed that the *continuance* of the administrative proceedings with the overhanging threat of the disallowance penalties *would cause the banks to withdraw* the credit extended, resulting in a shut down of plaintiff's business, cancellation of its government contracts, and consequent bankruptcy" (emphasis added). 114 F. Supp. at 391.

It is the nature of the damage proved by Appellee herein which serves to distinguish this case from *Franklin v. Jonco Aircraft Corp.*, 346 U.S. 868, 74 S.Ct. 126 (1953).

Threaded through Appellants' entire discussion of the equity jurisdiction of the Court below is the suggestion that the administrative hearing "*might* have resulted in a finding that no violation on Appellee's part, or that if a violation had occurred, no disallowance or no more than a nominal disallowance was warranted in the light of the surrounding circumstances" (Aplts. Br. pp. 28-29, emphasis added). But it is the other side of the coin which concerns Appellee:

Total wage payments paid by Appellee in violation of the regulations, according to Appellants' allegations, amounted to $5,561,484.11. Of this sum, $755,305.50 was computed as the amount of the illegal excess (*supra*, p. 8). Under the Economic Stabilization Administrator's General Order 15, Section 4(b) (17 Fed. Reg. 2994, 9977), the former amount was subject to disallowance in the absence of a showing of extenuating or mitigating circumstances as defined therein, and if there were such circumstances, which Appellants have at no time conceded, the latter amount was disallowable, it being provided that if extenuating or mitigating facts were proved, nevertheless,

> ". . . the usual and general policy shall be to disallow an amount at least equal to that portion of any payment or accrual in excess of whatever payment was permissible under the governing regulation, order or determination."

It was established that extensions of bank credit in the amounts then being made under the loan agreement were

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vital to Appellee's continued operation, that such loans were Appellee's only assurance that it would have adequate working capital to meet heavy weekly payroll and other recurring expenses [R. 54-56].[26] It was shown that the current agreement would expire September 30, 1953 [R. 55]. The executive vice-president of the bank acting as agent for the several banks under the credit agreement, a man responsible for making recommendations to the bank's board of directors regarding loan policy [R. 62-63], testified as follows:

> "Q. Mr. Lawyer, if an enforcement commissioner of the National Enforcement Commission in a proceeding involving the Grand Central Aircraft Company should make findings and determinations that wages in the amount of $5,000,000 or more should be disallowed for income tax and or an alternatively contract reimbursement purposes for the year 1951, what would be your recommendation to the Board of Directors of your bank with reference to the requests from Grand Central Aircraft Company to extend the present credit agreement beyond September 30, 1953?
>
> The Witness: Under those circumstances, sir, I would give a negative recommendation to my Board of Directors with respect to the further extension of credit.
>
> Mr. Lund: Q. By saying 'negative' you mean you would recommend that the bank not extend the credit agreement, is that correct? A. That is correct.

---

[26]The evidence showed that during the 4-week period immediately before the trial, the average weekly receipts of Appellee, aside from loan receipts, amounted to $111,280.41. The average weekly payroll alone amounted to $228,061.27, and Appellee had other even greater operating expenses [R. 53-54, 79].

Q. Would that also be true if the enforcement commissioner's findings and determinations was that the amount of such disallowance should be $3,000,000? A. In my opinion, the recommendation should continue to be negative under those circumstances based on the financial condition of the company as I know it at this time.

Q. And would the same be true if the findings and determinations of the enforcement commissioner was for a disallowance of a million dollars? A. Yes.

Q. Three-quarters of a million dollars? A. Yes, sir." [R. 63-64].

Appellants argue (Aplts. Br. pp. 29-30) that only the National Enforcement Commission had authority to issue a certificate of tax disallowance, and that there could be no injury resulting from the proceedings before the Enforcement Commissioner. This argument overlooks the degree of finality which attached to the Enforcement Commissioner's determination. As provided in General Procedural Regulation 1, Revised, Section 4.1(f), 17 Fed. Reg. 7737, 18 Fed. Reg. 1663:

> "If no appeal is filed as hereinafter provided, the findings and determination of the Enforcement Commissioner shall, in the absence of clear and prejudicial error, be adopted by the National Enforcement Commissioner and a certificate of disallowance based thereon issue to the appropirate departments or agencies of the government."

More significantly, the argument overlooks the effect which such findings and determination would have on the banks extending credit to Appellee. As was shown in the testimony of the executive vice-president of the bank

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administering the loan, notwithstanding a theoretical right to appeal to the National Enforcement Commission, an Enforcement Commissioner's disallowance of any amount from the $5,000,000 maximum claimed, to $750,000, an amount less than the "ordinary and usual" minimum disallowance, would cause the banks to withdraw the vital credit being extended. Without such credit the Appellee would be forced into bankruptcy. Assuming, as Appellants now argue (contrary to the Agency's General Order No. 15) court review would be permissible after a final order of the National Enforcement Commission, it would not be available unless Appellee paid any tax deficiency assessed as the result of such order and sued for refund, or appealed from a Tax Court decision. We have already discussed the proof showing that neither of these courses would be available (*supra,* pp. 80-82).

Thus Appellants would require Appellee to gamble on the favorable outcome of an invalid administrative proceeding at the risk of being put out of business. Indeed, they argue, in effect, that even though Appellee would be put out of business by the action of third parties taken in direct response to the challenged administrative action, this damage is not the kind which brings a case within equity jurisdiction (Aplts. Br. p. 35). This is not the law.[27] *Utah Fuel Co. v. National Bituminous Coal Comm'n,* 806 U.S. 56, 59 S.Ct. 409 (1939) (damage from agency's release to public of confidential informa-

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[27]The cases cited by Appellants in support of this assertion (Aplts. Br. pp. 36-37) simply did not involve a showing of actual damage, as pointed out *supra,* p. 93. No significance was attached by the Court in either of such cases to whether the source of the alleged damage was the decree of the agency itself, or the reaction of third parties to such decree.

tion relative to plaintiff's business would be irreparable). Included in the concept of irreparable injury is any injury which results from agency action, not just injury directly flowing from an agency order.

B. Exhaustion of Administrative Remedies Has Not Been Required Where Administrative Adjudicatory Procedure or Judicial Review Is Not Specifically Prescribed by Statute.

When the administrative complaint was first filed, Appellee moved to dismiss on the ground the National Enforcement Commission had no jurisdiction because of the invalidity of the Act and the regulations thereunder. This motion was dismissed, as have been similar motions made in other cases.[28] Appellee then sought an injunction.[29]

It is review of this denial of Appellee's motion which was sought in the district court, in an attempt to avoid the compulsive effect of the issuance of the complaint and the order for the administrative hearing. It is this com-

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[28]*Wags Transportation Co.*, N.E.C. No. 88 (Sept. 1953) ("This Commission assumes the validity of the Act and the Regulations under which it operates"); *Gorneilus & Read Co.*, N.E.C. No. 121 (Sept. 10, 1953); *Gross Electric Co.*, N.E.C. No. 117 (Sept. 14, 1953); *Balworth Co.*, N.E.C. No. 111 (Sept. 1953). See also General Procedure Regulation 1, Revised, Section 10.1 (17 F.R. 7737), preventing challenge of regulations before the Commission. (*Supra*, p. 6.)

[29]The regional officials of the Wage Stabilization Board and of the National Enforcement Commission could be enjoined irrespective of service on national officials where the only relief sought was prevention of regional action against Appellee. *Williams v. Fanning*, 332 U.S. 490, 69 S.Ct. 188 (1947).

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pulsion which Appellee seeks to enjoin. See *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 67 S.Ct. 1146 (1947).

This Court has often passed upon the issue of administrative jurisdiction when such review is sought at the commencement of the administrative process. It has done so where impending irreparable injury is shown and where the questions presented relate to the constitutionality or statutory validity of administrative procedures. *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552 (1947); *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 67 S.Ct. 1146 (1947); *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 317 U.S. 456, 63 S.Ct. 369 (1943); *Smith v. Cahoon*, 283 U.S. 553, 51 S.Ct. 582 (1931); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215 (1926); *Waite v. Macy*, 246 U.S. 606, 38 S.Ct. 395 (1918); *see Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 773, 67 S.Ct. 1493, 1503 (1947).

Thus, where challenged orders of an administrative agency "are on their face plainly invalid" because exclusive jurisdiction is invested in a federal regulatory agency, so that "No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal act," exhaustion is not required. *Public Utilities Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 469, 63 S.Ct. 369, 376 (1943). Indeed, the court held in the cited case that the mere fact that complainant company would incur expenses in complying with the void orders constituted sufficient irreparable injury to justify an injunction. The present case is strikingly similar, involving as it does a wholly unwarranted assertion of jurisdiction by officials whose orders now have not even the color of authority

which a subsisting statute might furnish.[30] And the showing of damage here goes far beyond the damage deemed sufficient in the *United Fuel* case.[31]

Of course the situation is different where the statute itself expressly creates the agency and spells out effective judicial review. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 58 S.Ct. 462 (1938):

> "The grant of that exclusive power is constitutional, because *the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board.* No power to enforce an order is conferred upon the Board. To secure enforcement the Board must apply to a Circuit Court of Appeals for its affirmance. And, until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it." (Emphasis added.)

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[30]Despite the Appellants' same exhaustive argument, a number of district courts have granted preliminary injunctions in other suits attacking the statute and regulations involved here. *Forsyth Engineering Co. v. Fleming*, 24 CCH Lab.Cas. ¶ 67,829 (U.S.D.C., D.C., No. 3440-53, *per* Miller, J., 1953); *Aaron Machinery Co. v. National Enforcement Commission*, 24 CCH Lab.Cas. ¶ 67,869 (U.S.D.C., D.C., No. 3754-53, *per* Holtzhoff, J., 1953); *Belcher Oil Co. v. National Enforcement Commission*, 114 F.Supp. 377 (N.D. Ga. 1953).

[31]There is nothing in *Pennsylvania R. Co. v. Labor Board*, 261 U.S. 72, 43 S.Ct. 278 (1923) (Aplts. Br. p. 31), which indicates that equitable jurisdiction is lacking here. This case merely holds that a specific agency determination is in some circumstances not itself reviewable as long as the agency had jurisdiction to make the determination. The Court took pains to decide that the agency was granted constitutional statutory powers and was acting within them. The other cases cited are similar. We shall be satisfied if the Court decides this issue of jurisdiction.

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Contrast the present case, where the Act provides for neither procedure nor review, and where the order of the Economic Stabilization Administrator provides that agency action shall be final and conclusive upon the tax court and any other court (*supra,* pp. 80-81). The *Myers* case may be distinguished upon the additional ground that the principal issue before the Board and the court was whether operation of complainant's business affected interstate commerce—an issue peculiarly within the expert knowledge of the Board to determine initially. In the present case, on the other hand, the issues before the Court are issues upon which the agency had refused to rule and upon which it could not competently rule.

Appellants have attempted to meet the distinction between this case and cases involving agencies specifically created by statutes which prescribe an administrative remedy, by citing cases purportedly applying the exhaustion rule where the administrative remedy is prescribed by regulation issued pursuant to statutory authority. But in these cases the Court did *not* require exhaustion but proceeded to rule on the challenge to the administrative action involved.

Thus in *Fahey v. Mallonee,* 332 U.S. 245, 67 S.Ct. 1552 (1947), involving, as here, a direct appeal from a three-judge court, the Court decided the constitutional issues presented, held the hearing procedure prescribed by regulation valid, and did not even refer to the "exhaustion" rule. And similarly in *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117, 46 S.Ct. 215 (1926), a suit for mandamus, the Court ruled upon the challenged powers of the tax court to issue rules regulating practice before it. In *Twentieth Century Airlines v. Ryan,*

..... U.S. ....., 74 S.Ct. 8, 11-12 (1953), Mr. Justice Reed pointed out that, "Applicants cite no case in this Court that enjoins the hearing of complaint before an administrative Board *with power* to enter an enforcement order that is *subject to judicial review*" (emphasis added).

C. The Specific Provisions in the Regulations Prohibiting Judicial Review of National Enforcement Commission Orders Are a Further Ground Justifying the Injunction Herein.

Appellants contend (Aplts. Br. pp. 38-41) that the provisions against judicial review contained in the orders of the Economic Stabilization Administrator (General Order 15 and General Procedural Regulation 1, Revised, *supra,* pp. 80-81), are not separate grounds entitling Appellee to an injunction. (The availability of judicial review of an administrative decision on the merits would not, of course, diminish Appellee's right to an injunction upon the grounds for equitable jurisdiction already discussed.)

Appellants state that the regulation barring review "either is lawful or it is not" (Aplts. Br. p. 40). Although Appellants have, throughout the course of this litigation contended that the regulations do not necessarily bar review, these regulations have remained unchanged and were recently adopted by the Director of the Office of Defense Mobilization. It is clear that the administrators want to be in a position to urge that their determinations be treated with absolute finality (this point is expanded *supra,* p. 81, n. 21); yet they argue that this posi-

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tion does not furnish Appellee with any reason to commence the present litigation. Nevertheless, where there is doubt concerning the existence of administrative remedy or remedy at law, an injunction will be granted. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863 (1952); *Hillsborough Tp. v. Cromwell,* 326 U.S. 620, 66 S.Ct. 445 (1946); *Wallace v. Hines,* 253 U.S. 66, 40 S.Ct. 435 (1920).

This is not the customary injunction case against an administrative agency. In cases where the doctrine of exhaustion of administrative remedies has been applied, the agency has been created and methods of review provided in specific statutory terms. Here the National Enforcement Commission has assumed adjudicatory powers without authority, has purported to make its determinations non-reviewable, and has continued to act in such manner after expiration of the statute giving any color of legality to its proceedings. In these circumstances the injunction issued below was in the nature of a writ of prohibition against assumption of power by administrative officials without statutory warrant.

We have just received (March 1, 1954), a copy of the unpublished February 19, 1954 opinion of Judge Holtzoff of the United States District Court for the District of Columbia in the case of *Slim Olson, Inc. v. National Enforcement Commission,* No. 4175-53. Therein he permanently enjoined the Commission from entering a final decision. The Court held that (1) any authority the

Commission may have theretofore had under the statute terminated on May 1, 1953, and (2) Section 405(f) did not authorize the President to disallow the total illegal wage, as distinguished from the illegal excess. In this latter connection, the Court observed that a serious Constitutional issue would be raised if the section were construed to authorize disallowance of the entire wage. Finally, in connection with the so-called "exhaustion" principle, Judge Holtzoff concluded:

> ". . . In this case the very existence of the agency has been challenged. In other words, the plaintiff urges in effect that the National Enforcement Commission has been abolished and its members have become private citizens who are intruding into the Government and usurping governmental powers that are not vested in them. Surely a person aggrieved by the action of a private citizen who is claimed to have no official status, but who arrogates official powers to himself, should not be required to submit himself to the assertion of authority before appealing to the courts. Whether the plaintiff's contention is well founded is a matter to be discussed hereafter, but if the plaintiff predicates his position on this basis, he should be permitted to resort to the courts and secure a decision in respect to the merits of his contention. At common law a writ of *quo warranto* would lie under such circumstances. Any remedy that could have been obtained by such a writ may now be secured by a civil action."

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Conclusion.

The three-judge statutory trial court properly enjoined the Appellants from proceeding against Appellee in an illegal, invalid, and unconstitutional administrative hearing. That decree should be affirmed by this Court.

Dated: March 2, 1954.

Respectfully submitted,

RICHARD W. LUND,
DANA LATHAM,
PAUL R. WATKINS,
Attorneys for Appellee.

RICHARD F. ALDEN,
GROVER R. HEYLER,
LATHAM & WATKINS,
Of Counsel.

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APPENDIX.

I.

Defense Production Act of 1950.

The Defense Production Act of September 8, 1950, 64 Stat. 798, 50 U.S.C. App. §§ 2061 *et seq.* (Supp. V 1952) (the section numbers of said 50 U.S.C. App. (Supp. V 1952) hereinafter appear in parenthesis following the section numbers of the Act), as amended by the Defense Production Act amendments of 1951, 65 Stat. 131; of 1952, 66 Stat. 296; and 1953, 67 Stat. 129, provides in pertinent part:

SECTION 401 (§2101) (Congressional policy).

* * * * * * * * *

SECTION 402 (§2102) (Authorization for price and wage controls).

* * * * * * * * *

SECTION 403(a) (§2103(a)) (Aplts. Br. Apdx. pp. 79-80).

* * * * * * * * *

SECTION 403(b) (§2103(b)).

(1) There is hereby created, in the present Economic Stabilization Agency, or any successor Agency, a Wage Stabilization Board (hereinafter in this subsection referred to as the 'Board'), which shall be composed, in equal numbers, of members representative of the general public, members representative of labor, and members representative of business and industry. The number of offices on the Board shall be established by Executive order.

(2) The members of the Board shall be appointed by the President, by and with the advice and consent of the Senate. The President shall designate a Chairman and Vice Chairman of the Board from among the members representative of the general public.

(3) * * *

(4) * * *

(5) The Board shall, under the supervision and direction of the Economic Stabilization Administrator—

(A) formulate, and recommend to such Administrator for promulgation, general policies and general regulations relating to the stabilization of wages, salaries, and other compensation; and

(B) upon the request of (i) any person substantially affected thereby, or (ii) any Federal department or agency whose functions, as provided by law, may be affected thereby or may have an effect thereon, advise as to the interpretation, or the application to particular circumstances, of policies and regulations promulgated by such Administrator which relate to the stabilization of wages, salaries, and other compensation.

For the purposes of this Act, stabilization of wages, salaries, and other compensation means prescribing maximum limits thereon. Except as provided in clause (B) of this paragraph, the Board shall have no jurisdiction with respect to any labor dispute or with respect to any issue involved therein. Labor disputes, and labor matters in dispute, which do not involve the interpretation or application of such regulations or policies shall be dealt with, if at all, insofar as the Federal Government is concerned, under the conciliation, mediation, emergency, or

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other provisions of laws heretofore or hereafter enacted by the Congress.

(6) Paragraph (5) of this subsection shall take effect thirty days after the date on which this subsection is enacted. The Wage Stabilization Board created by Executive Order Numbered 10161, and reconstituted by Executive Order Numbered 10233, as amended by Executive Order Numbered 10301, is hereby abolished, effective at the close of the twenty-ninth day following the date on which this subsection is enacted. After June 27, 1952, the present Wage Stabilization Board shall issue no regulation or order except with respect to individual cases pending before the Board prior to such date.

SECTION 404 (§2104).

In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder.

SECTION 405(a) (§2105(a)) (Aplts. Br. Apdx. p. 80).

* * * * * * * * *

SECTION 405(b) (§2105(b)) (Aplts. Br. Apdx. p. 81).

* * * * * * * * *

SECTION 407(a) (§2107(a)).

At any time within six months after the effective date of any regulation or order relating to price controls under this title or rent controls under the Housing and Rent Act of 1947, as amended, or, in the case of new grounds arising after the effective date of any such regulation or order, within six months after such new grounds arise,

any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.

* * * * * * * * *

SECTION 408 (§2108).

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals specifying his objections and praying that the regulation or orders protested be enjoined or set aside in whole or in part. * * *

(b) * * *

(c) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any such regulation or order issued under this title or under the Housing and Rent Act of 1947, as amended. Except as provided in this section, no court, Federal, State, or Territorial, shall have juris-

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diction or power to consider the validity of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title, or the Housing and Rent Act of 1947, as amended, authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

(d) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 409 or 706 of this Act, section 205 or 206 of the Housing and Rent Act of 1947, as amended, or section 371 of title 18, United States Code, involving alleged violation of any provision of any such regulation or order, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the President setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 407 of this title. Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation or order complained of or to dismiss the complaint. The court may authorize the introduction of evidence,

either to the President or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b) and (c) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

SECTION 409 (§2109).

(a) * * *

(b) * * *

(c) If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or service for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50 as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation or order in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. * * *

(d) (Aplts. Br. Apdx. p. 82).

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SECTION 412 (§2112)

It is hereby declared to be the policy of the Congress that the President shall use the price, wage and other powers conferred by this Act, as amended, to promote the earliest practicable balance between production and the demand therefor of materials and services, and that the general control of wages and prices shall be terminated as rapidly as possible consistent with the policies and purposes set forth in this Act; and that pending such termination, in order to avoid burdensome and unnecessary reporting and record keeping which retard rather than assist in the achievement of the purposes of this Act, price or wage regulations and orders, or both, shall be suspended in the case of any material or service or type of employment where such factors as condition of supply, existence of below ceiling prices, historical volatility of prices, wage pressures and wage relationships, or relative importance in relation to business costs or living costs will permit, and to the extent that such action will be consistent with the avoidance of a cumulative and dangerous unstabilizing effect. It is further the policy of the Congress that when the President finds that the termination of the suspension and the restoration of ceilings on the sales or charges for such material or service, or the further stabilization of such wages, salaries, and other compensation, or both, is necessary in order to effectuate the purposes of this Act, he shall by regulation or order terminate the suspension.

SECTION 703(a) (§2153(a)) (Aplts. Br. Apdx. pp. 82-83).

* * * * * * * * *

SECTION 705(a) (§2155(a)) (Aplts. Br. Apdx. pp. 83-84).

* * * * * * * * *

SECTION 706(b) (§2156(b)) (Aplts. Br. Apdx. pp. 84-85).

* * * * * * * * *

SECTION 709 (§2159) (Aplts. Br. Apdx. pp. 85-86).

* * * * * * * * *

SECTION 717 (§2166).

(a) * * * (Aplts. Br. Apdx. p. 86).

(b)(3) * * * (Aplts. Br. Apdx. pp. 86-87).

(c) The termination of any section of this Act, or of any agency or corporation utilized under this Act, shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act prior to the date of such termination, or the taking of any action necessary to preserve or protect the interests of the United States in any amounts advanced or paid out in carrying on operations under this Act.

(d) * * *

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II.

Executive Orders and Regulations.

1. Executive Order No. 9809 of December 12, 1946, 11 Fed. Reg. 1428, provides in pertinent part:

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, Title III of the Second War Powers Act, 1942, Section 201(b) of the Emergency Price Control Act of 1942, as amended, and section 2 of the Stabilization Act of 1942, and as President of the United States, it is hereby ordered, for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government, as follows:

* * * * * * * * *

10. (a) The National Wage Stabilization Board is terminated.

(b) The functions heretofore vested in the National Wage Stabilization Board pursuant to the provisions of section 5(a) of the Stabilization Act of 1942, as amended, are transferred to the Department of the Treasury.

* * * * * * * * *

2. Executive Order No. 10494, dated October 16, 1953, 18 Fed. Reg. 6585.

By virtue of the authority vested in me by the Constitution and laws of the United States, including the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 et seq.), hereinafter referred to as the Act, and as President of the United States and Commander in Chief of the armed forces of the United States, it is ordered

that the functions remaining under Title IV of the Act shall be, and they are hereby, delegated as follows:

Section 1. *Fiscal liquidation.* Such functions as remain in connection with the fiscal liquidation of the Economic Stabilization Agency are hereby transferred to the Secretary of the Treasury.

Sec. 2. *Administrative proceedings.* The function of conducting administrative proceedings under Title IV of the Act, including the conclusion of those instituted pursuant to section 405 and the taking of necessary actions under sections 407 and 408 of the Act, is hereby transferred to the Director of the Office of Defense Mobilization.

Sec. 3. *Enforcement and investigations.* In addition to the functions now vested in the Attorney General by the Act, he shall have, and they are hereby transferred to him, the following-prescribed functions under Title IV of the Act: (a) completing the processing of enforcement files, (b) concluding investigations where deemed appropriate, and (c) certifying disallowances (section 409(d)).

Sections 1 and 2 of this order shall become effective November 1, 1953. Section 3 shall become effective immediately.

Dwight D. Eisenhower, The White House, October 14, 1953.

3. Economic Stabilization Agency General Order No. 15, 17 Fed. Reg. 2994, 9977, Aplts. Br. Apdx. pp. 89-93.

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4. Economic Stabilization Agency General Procedural Regulation 1, of September 20, 1951, 16 Fed. Reg. 10018, as revised August 21, 1952, 17 Fed. Reg. 7737, Aplts. Br. Apdx. pp. 97-103, provides in pertinent part:

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Section 10.1 *Interprctations.*—The Enforcement Commissioner, in making his findings and determinations, and the National Enforcement Commission in making its decisions, shall, to the extent applicable, be governed by the established regulations, interpretations, and policies formulated by the Board or Office involved in the enforcement proceeding.

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5. Economic Stabilization Agency General Order No. 19 of December 15, 1952, 17 Fed. Reg. 11368, provides in pertinent part:

SECTION 1. *Purpose.* The purpose of this order is to provide for the continued administration of the wage stabilization program during the period that the Wage Stabilization Board is rendered inoperative by the resignation of the Industry Members of the Board. This order provides for an interim Wage Stabilization Committee and defines its functions.

SEC. 2. *Legal Basis and Authority.* This order is promulgated under the authority vested in the Economic Stabilization Administrator by the Defense Production Act of 1950, as amended (Pub. Law 774, 81st Congress, Pub. Laws 96 and 429, 82d Congress), Executive Order 10161, as amended, Executive Order 10182, and Executive Order 10205.

SEC. 3. *The Wage Stabilization Committee.* The present Public Members of the Wage Stabilization Board and any persons appointed as Public Members of the Board shall also serve and are hereby designated as members of the Wage Stabilization Committee. The Chairman of the Wage Stabilization Board is hereby designated as Chairman of the Wage Stabilization Committee.

SEC. 4(a). *Functions and Redelegation.* With the exception of promulgating general policies and regulations, the Wage Stabilization Committee is hereby authorized to perform, under the supervision and direction of the Economic Stabilization Administrator, and with respect to persons who are under the jurisdiction of the Wage Stabilization Board, created by Section 403(b) of the Defense Production Act, as amended, and Executive Order 10377 and Executive Order 10390, the wage stabilization functions authorized by Title IV of the Defense Production Act of 1950, as amended.

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Section 5. * * *

Section 6. * * *

6. General Administrative Order-I-2, Revised, of the Office of Defense Mobilization and effective November 1, 1953, 18 Fed. Reg. 6966.

Administrative Proceedings Under Title IV of The Defense Production Act of 1950, as Amended.

Section 1. The purpose of this General Administrative Order is to provide for the conduct and orderly completion of administrative proceedings arising under section 405, 407 and 408 of the Defense Production Act

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of 1950, as amended, which function has been made the responsibility of the Director of the Office of Defense Mobilization by Executive Order 10494 of October 14, 1953 (18 F. R. 6585).

Sec. 2. Subject to such supervision as the Director may deem appropriate, the General Counsel of the Office of Defense Mobilization is hereby authorized to carry out the functions delegated to the Director by Executive Order 10494. For these purposes the General Counsel is also designated as Assistant Director of the Office of Defense Mobilization. The term "functions" includes powers, duties, authority, responsibilities, and discretion.

Sec. 3. The orders of the Economic Stabilization Agency which are relevant to the conduct and completion of administrative proceedings under sections 405, 407 and 408 of the act, particularly ESA General Order 15 and 18, as amended (17 F. R. 2994, 6925, and 9977); ESA General Procedural Regulation 1, Revised, as amended (17 F. R. 7737, 18 F. R. 1663); and OPS Price Procedural Regulation 1, Revision 2, as amended (17 F. R. 3787 and 9935) are hereby adopted and incorporated herein by reference.

Sec. 4. This General Administrative Order shall become effective November 1, 1953.

Office of Defense Mobilization.

Arthur S. Flemming, Director.